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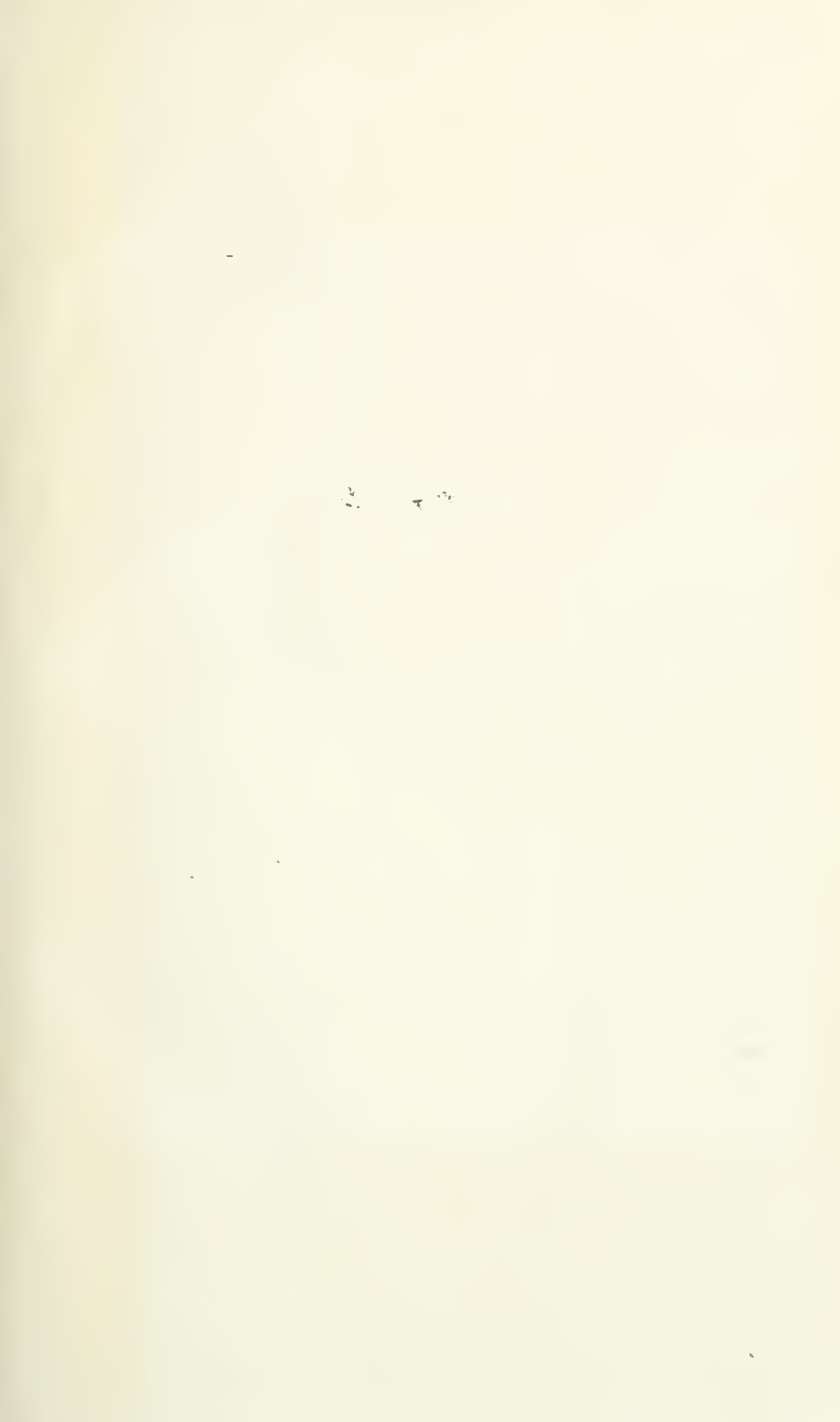
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2567  
No. 12145

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United States  
Court of Appeals  
for the Ninth Circuit

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W. M. (Alias, BILL) GILLIS,  
Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,  
Appellees.

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Transcript of Record

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Appeal from the District Court for the Territory of Alaska,  
Second Division

FILED

Feb 19 1949

W. P. O'BRIEN,









No. 12145

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United States  
Court of Appeals  
for the Ninth Circuit

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W. M. (Alias, BILL) GILLIS,

Appellant,

VS.

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Transcript of Record

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Appeal from the District Court for the Territory of Alaska,  
Second Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

For Plaintiff,

W. M. GILLIS,  
C. C. TANNER,  
Nome, Alaska.

For Defendants,

BEN F. GILLETTE and  
IRENE GILLETTE,  
CHELLIS CARPENTER,  
Mills Building,  
San Francisco, California.

In the District Court for the Territory of Alaska  
Second Division

No. 3737

W. M. (Alias, BILL) GILLIS,

Plaintiff,

vs.

BEN F. GILLETTE and IRENE GILLETTE,  
Defendants,

### COMPLAINT

Plaintiff complains of defendants and for cause of action alleges:

1.

That plaintiff is now, and was at all times hereinafter stated, a contractor and builder doing business as such at Nome, Alaska, and that as such contractor and builder, on and between the 10th day of September, 1946, and the 15th day of December, 1946, at the special instance and request of defendants (owners) and upon their promises to pay the reasonable value thereof, the plaintiffs performed work and labor and furnished and supplied work, labor and materials, to the defendants, in and about the removal of a frame dwelling house owned by the defendants, from Lot 1, Block L, to Lot 8, and the north 22 feet of Lot 7 in Block B, Nome, Alaska, also owned by the defendants, and the erection, alteration and repair of said building upon its new location on Lot 8 and the north 22 feet of Lot 7, Block B, aforesaid, where it is now situate; that the said labor was performed and

said materials were furnished to be used, and were actually used, in the removal, erection, alterations and repairs of said dwelling house; and that said labor and materials were of the reasonable worth and value of \$2,746.83.

2.

That the defendants were, at the dates hereinbefore mentioned, and still are, the owners and reputed owners of the premises described as Lot 8 and the north 22 feet of Lot 7, all in Block B, Nome, Alaska, as hereinbefore mentioned; and that the said premises, and the whole thereof, are required for the convenient use and occupation of said dwelling-house.

3.

That the last date upon which said work and labor of removing, altering, erecting and repairing said building was performed, and said materials were furnished, is December 15, 1946.

4.

That the plaintiff duly filed, as required by law, his claim for a lien for the amount due and owing him as aforesaid from said defendants, in the office of the recorder for the Cape Nome Precinct, Second Division, Alaska, on the 14th day of March, 1947, and within ninety days from the date the last labor was performed and materials furnished as aforesaid, which claim for lien was duly signed and verified by the claimant, plaintiff herein; A true copy of this said claim of lien is attached hereto and marked Exhibit A, and form a part of this

complaint to the same extent as though it were set forth at large herein.

## 5.

That no part of the price or reasonable value of said labor and materials has been paid, except the sum of One Thousand Dollars (\$1,000.00); that plaintiff has several times made demand upon defendants for the balance due and owing as aforesaid, but the defendants refused to pay, and do now refuse to pay the same; and that there is now due and owing to the plaintiff from said defendants on account of performing labor and furnishing labor and materials, as aforesaid, the sum of One Thousand Seven Hundred Forty-Six Dollars and Eighty-three cents (\$1,746.83), with interest thereon at the rate of six per cent per annum from December 16th, 1946.

Wherefore, plaintiff prays judgment against defendants and each of them, [1\*] for the sum of \$1,746.83, with interest at 6% per annum from December 16th, 1946; for \$1.95, cost of filing lien; for a reasonable attorney's fee; and costs of suit; and that the said premises described as Lot 8 and the north 22 feet of Lot 7, Block B, Nome, Alaska, be sold under the decree of this court, according to law and the proceeds be applied in payment of said judgment; and that in case of deficiency arising from such sale, that the plaintiff have judgment for such deficiency and have execution thereof; and

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



for such further relief as may be just and equitable.

/s/ C. C. TANNER,

Attorney for Plaintiff. [2]

(Duly Verified.)

## EXHIBIT A

### NOTICE OF CLAIM OF LIEN ON REAL PROPERTY

Notice is hereby given that a short time prior to Sept. 10th, 1946, Mr. Ben F. Gillette and Irene, his wife, of Nome, Alaska, employed and authorized Bill Gillis of Nome, Alaska, to remove a certain frame dwelling house owned by them, from Lot 1, Block L, Nome, Alaska, to premises owned by them in Nome, Alaska, and described as Lot 8, and the North 22 feet of Lot 7; to place, erect, alter and repair said building on its new location; and to furnish and supply the necessary labor, and the locally available materials necessary and practicable to accomplish the desired results.

That the said Bill Gillis commenced the employment aforesaid the 10th day of Sept., 1946, and ended such employment, and the furnishings of labor and materials, as aforesaid, on the 15th day of December (inclusive), 1946.

That under and by virtue of said employment the said Bill Gillis furnished and supplied 987 hours of labor at the regular and reasonable cost and charge of \$2,220.75; and materials, which actually went into the construction, alteration and repair of the aforementioned building, at the actual cost and

reasonable charge of \$526.08: Making a total cost and charge for labor and materials of \$2,746.83.

That the sum of \$1,000.00 has been paid on this account, leaving a balance now due and owing of \$1,746.83, after allowing and deducting all credits and offsets.

That a lien is claimed by Bill Gillis for the aforesaid sum of \$1,746.83, against the premises in Nome, Alaska, described as Lot 8, and the North 22 feet of Lot 7, all in Block B, including the residence building situate and located thereon.

That the premises against which this lien is claimed, are owned by Ben F. Gillette and Irene, his wife, of Nome, Alaska.

/s/ BILL GILLIS,  
Lien Claimant.

United States of America,  
Territory of Alaska—ss.

Bill Gillis, being first duly sworn on oath deposes and says: I am claimant named in the foregoing claims of lien. I have read and know the contents thereof. All things stated therein are true as I verily believe.

/s/ BILL GILLIS,

Subscribed and Sworn to before me the 14th day of March, 1947.

[Seal] /s/ C. C. TANNER,  
Notary Public for Alaska.

My Commission expires July 18, 1950.

[Endorsed]: Filed Sept. 13, 1947. [3]

[Title of District Court and Cause.]

## DETAILED STATEMENT OF ACCOUNT

Comes now plaintiff herein and files detailed items of the account sued upon in this action and particularly in reference to paragraph 1 of the Complaint:

### A. Items of Labor

(1) Wrecking, cleaning off and removing unsuitable concrete foundation forms prepared by Bud Harper for new location of house on Lot 8 and the No. 22 ft. of Lot 7, Block B, Nome, Alaska.

(2) Backfilling of basement on new house location to bring footing level to grade as specified and ordered by owners.

(3) Erecting on new house location, footing and wall concrete forms for full basement, plus an addition as specified by owners; all of which included the hauling and installing of reinforcement iron.

(4) Mixing, and pouring concrete to grade as specified by owners for footings and 9 in. basement walls.

(5) Stripping forms and removal of same after the pouring and setting of concrete.

(6) Raising house from old foundation on Lot 1, Block L, Nome, Alaska, and placing same on skids, preparatory to removal to new location.

(7) Moving house to new location.

(8) Raising, lining up and placing house on new location foundation.

(9) Framing a new addition to house on its new location and installing in connection therewith

a triple window frame and three sash, an outside door frame, roof valley tin, shingles, celote, siding strips, corner boards and felt paper, all in so far as materials were available and all in accordance with owner's specifications.

(10) Applying asbestos shingles to house including addition, when supplied by owners.

(11) Remodeling kitchen and old stairway of house in accordance with owners directions.

(12) Placing tailings gravel for backfill, in and around the basement walls of the new location of house, all as directed by owners. [4]

B. Materials furnished and other items of expense.

6 pc. 4/81½ black celotex at \$4.00.....	\$24.00
3 windows—1 triple frame—	
1 O. S. door frame.....	52.30
Roof valley tin and bracket.....	3.50
7 concrete flue blocks at \$2.95.....	20.65
1 keg 16 D commons.....	12.00
1 keg 8 D commons.....	12.00
1 keg 6 D commons.....	12.00
Form wire .....	10.00
8 pcs. 2/12-16 ft. ....	31.00
1 bunch wood shingles.....	3.50
5 pcs. 1/4-12 ft. No. 1 fir finish.....	3.50
3 bunches siding strips.....	1.50
2 lbs. siding nails.....	.40
3 rolls 15 lb. felt.....	11.35
20 lbs. 2 D. shingle nails.....	2.40
Sand and gravel for backfill and concrete.....	261.00
Rent on Cat and concrete mixer.....	64.00
Tax on materials furnished.....	1.47

————— \$ 526.08

Labor from Sept. 10 inc. Dec. 16 (exclusive), 1946	
987 hours .....	\$2,220.75
Total .....	\$2,746.83
10-15-46 on account .....	1,000.00
	<hr/>
	\$1,746.83

Dated November 5, 1947.

/s/ W. M. GILLIS.

(Acknowledgment of Service.)

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[Title of District Court and Cause.]

### ANSWER

Answering the Complaint of the plaintiff, the defendants admit, deny and allege:

#### I.

Answering Paragraph 1 of said Complaint, defendants admit that plaintiff is now and at all times mentioned in said Complaint, was a contractor and builder doing business at Nome, Alaska, and that the defendants are and were the owners of Lot 1, in Block L, and Lot 8 and the No. 22 ft. of Lot 7 in Block B, and the building formerly upon Lot 1, in Block L, Nome, Alaska, and that said building is now situate on Lot 8 and the No. 22 ft. of Lot 7, in Block B in said city; and except as hereinafter affirmatively alleged, deny generally all other allegations in said paragraph 1 of said Complaint.

#### II.

Answering paragraph 3 of said Complaint, defendants have no knowledge or information suffi-

cient to form a belief as to such allegations and therefore, deny the same.

### III.

Answering paragraph 4 of said Complaint, defendants admit that the plaintiff filed a purported lien in the office of the Recorder for the Cape Nome Precinct, Second Division, Alaska, on the 14th day of March, 1947, and that a purported copy of such lien is attached to said Complaint; and defendants deny generally all other allegations set forth in said paragraph 4.

### IV.

Answering paragraph 5 of said Complaint, defendants admit that they paid to the plaintiff the sum of \$1,000.00 on account of work done by him for moving the house of the defendants from Lot 1, Block L, to Lot 8 and the No. 22 ft. of Lot 7, in Block B, pursuant to the agreement hereinafter affirmatively alleged and the defendants otherwise deny generally all of the allegations in said paragraph 5 of said Complaint.

### V.

Further answering plaintiff's Complaint and by way of Cross Complaint, defendants allege that on or about the 8th day of August, 1946, plaintiff and defendants entered into an agreement wherein and whereby the plaintiff agreed to move, in a skillful and workmanlike manner, the residence of the defendants located on Lot 1, Block L, on the south side of Front Street, to Lot 8 and the No. 22 ft. of Lot 7 in Block B, in Nome, Alaska, which said lots and



residence were then and now are owned by the defendants; and under the terms of which said agreement, the plaintiff was to pour a full cement basement, in a skillful and workmanlike manner, for said residence at the place to which the same was to be moved and to build thereon, when said residence was moved, an addition of the size of 8 ft. x 30 ft. across the back and enclose a porch to be used for a dining room of the size 7 ft. x 17 ft. on the east side, and to complete the same in a skillful and workmanlike manner for occupancy. And to take the heavy timbers of the size 6" x 8" from the bulkhead on Lot 1 Block L on the south side of Front Street and use them as posts in the concrete basement, under the residence, when moved, as braces. And to have said building moved and completed as aforesaid in the month of October, 1946. And under the terms and conditions of said agreement, all materials were to be furnished by the defendants and for which the defendants promised and agreed to pay to the plaintiff the sum of \$2,872.28. [6]

## VI.

That prior to the commencement of the moving of said dwelling and at the request of the plaintiff, the defendants paid to the plaintiff upon such contract the sum of \$1,000.00.

That the plaintiff in violation of said agreement, failed, neglected and refused to move said residence to said Lot 8 and the No. 22 ft. of Lot 7 in Block B until on or about the 12th day of November, 1946, and after freezing weather.

## VIII.

In the latter part of January, 1947, the plaintiff advised the defendants that he was going to do nothing further in connection with the moving of said residence of defendants, or upon such residence, or the concrete basement thereunder. That thereafter the defendants completed said cement basement at a cost of \$327.50 which sum was a reasonable amount therefor.

## IX.

That the plaintiff left said residence unbraced by reason of which it sagged in the middle a distance of five inches and until the doors in the building would not open and the defendants were compelled to have said building raised and five bracing posts put thereunder and for which they expended the sum of \$190.00.

## X.

That the defendants had thawed and excavated a sump, in the basement of said dwelling, and expended therefor \$39.75, which said sump the plaintiff, wantonly and negligently filled in and the same became a total loss to the defendants.

## XI.

That the plaintiff in the moving of said dwelling after freezing weather had begun, negligently left the basement of said building open by reason of which the ground floor of the basement froze and plumbing was damaged, and to repair it the defendants have expended the sum of not less than \$107.89.



## XII.

That in the moving of said residence, the plaintiff carelessly and negligently failed to sufficiently brace a concrete block chimney, so that it was practically ruined and to repair it the defendants have paid the sum of \$100.00.

## XIII.

That the plaintiff failed, neglected and refused to complete the addition to said residence to be used for a dining room and defendants were compelled to complete the same at a cost of \$260.00.

## XIV.

That the plaintiff removed and took away from said premises one Burks pressure pump, which has never been returned to the defendants, of the value of \$150.00.

## XV.

That in the moving of said residence, the plaintiff cut off one corner of said residence and failed, neglected and refused to repair the same, and the cost of such repair will be at least \$100.00.

## XVI.

That in the pouring of the walls of said cement basement the plaintiff negligently poured the same without proper foundation by reason of which the walls of said basement cracked in diverse places and the water now seeps through the walls into the basement, by reason of which the defendants have been damaged in the sum of \$500.00. [7]

## XVII.

That by reason of the plaintiff failing to move said building and have the same ready for occup-

ancy as provided for in said agreement, the defendants were unable to move into said residence before the 15th day of February, 1947, and were compelled to expend for room rent during such period that they were kept from the occupancy of such residence, in the sum of \$410.00; and were compelled to board at the restaurants during such period and for such board they expended the sum of \$412.00.

### XVIII.

That by reason of the breach of said contract by the plaintiff and his failure to move said dwelling and have the same ready for occupancy as provided for in said agreement, the defendants have been damaged in the sums and amounts as herebefore stated and in the total sum of \$2,597.14.

Wherefore the defendants pray judgment against the plaintiff for the sum of \$724.86; and for the costs and disbursements herein incurred, including a reasonable attorney's fee.

/s/ O. D. COCHRAN,  
Attorney for Defendants.

(Duly Verified.)

[Endorsed]: Filed Nov. 26, 1947.

[8]

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[Title of District Court and Cause.]

### REPLY

In reply to defendants answer filed herein, plaintiff admits, denies and alleges as follows:

## 1.

Replying to paragraph V of said answer, plaintiff admits and alleges that on or about the 8th day of August, 1946, he was approached by defendants in reference to furnishing the work and labor necessary to do the jobs for defendants as outlined in said paragraph V, and that at the time defendants stated that all materials would be furnished by them: That plaintiff then and there informed defendants that he was tied up doing contract work and that in the event he undertook the work for defendants, their work would have to be wedged in between these contract jobs. Plaintiff also admits, that at the request of defendants he furnished them with an estimated labor cost bill which was in the amount of \$2,872.28; that defendants stated they considered the estimate of labor too high, but later notified plaintiff to go ahead and do the work.

Except as admitted herein, plaintiff denies every allegation in said paragraph V contained.

## 2.

Replying to paragraph VI of defendants answer, plaintiff acknowledges receipt from defendants of \$1,000.00 paid on account of work being then performed under defendants' "go ahead" order set forth in paragraph 1 herein just above, but that said sum was less than the amount or sum then due plaintiff for the work he had already performed for them.

Except as herein admitted, plaintiff denies all allegations in said paragraph VI contained.

## 3.

Replying to paragraphs VIII of defendants' answer, plaintiff admits telling defendant Ben F. Gillette that he would do no more work for defendants but that the statement was made after defendant Irene Gillette had ordered plaintiff to discontinue the work as affirmatively alleged hereinafter.

Due to lack of information, plaintiff denies all other allegations in said paragraphs VIII contained.

## 4.

Replying to paragraph IX of defendants' answer, plaintiff, because of lack of information, denies all allegations therein contained; and alleges that if any sagging took place as alleged, it took place after work had been stopped by defendant Irene Gillette, and was not the fault of plaintiff.

## 5.

Replying to paragraph X of defendants' answer, because of lack of information, plaintiff denies all allegations therein contained; and alleges that if a sump was filled in as alleged, it was filled in by reason of back-fill placed at the direction of defendants and without acknowledge on the part of plaintiff of any such sump. [9]

## 6.

Replying to paragraph XI of defendants' answer, plaintiff because of lack of information, denies all allegations therein contained; and alleges that plaintiff had nothing whatsoever to do with the plumbing of defendants' residence either before or after it was moved.

7.

Replying to paragraph XII of defendants' answer, plaintiff denies all allegations therein contained.

8.

Replying to paragraph XIII of defendants' answer, plaintiff, because of lack of information, denies all allegations therein contained; and alleges that prior to the time work was stopped by defendant Irene Gillette, materials were not available for the completion of the dining room as alleged.

9.

Replying to paragraph XIV of defendants' answer, plaintiff denies all allegations therein contained.

10.

Replying to paragraph XV of defendants' answer, plaintiff admits cutting off a corner of the cornice of the residence building in order to get the building in place and that he did not repair the same, but alleges that the cornice was cut off with the knowledge, consent and approval of defendants, and that the same was not repaired due to the fact that defendant Irene Gillette, stopped the work before the repairs could be made.

Plaintiff, due to lack of information, denies all other allegations in said paragraph XV contained.

11.

Replying to paragraph XVI of defendants' answer, plaintiff, due to lack of information denies all allegations therein contained, and alleges that defendants prepared the foundation for the pour-

ing of the cement walls and that the pouring was done in accordance with directions of defendants.

12.

Replying to paragraph XVII of defendants' answer, plaintiff, due to lack of information, denies all allegations therein contained, and alleges that any expenditures made by defendants as alleged, was not the result of breach of contract on the part of plaintiff.

13.

Replying to paragraph XVIII of defendants' answer, plaintiff denies all allegations therein contained.

For further reply to defendants' answer plaintiff alleges:

A.

That although defendants originally agreed that they would furnish all materials necessary to complete the jobs as alleged and for which plaintiff was hired to furnish the labor, from time to time as the work progressed, materials were needed which defendants did not have available, and at such times defendants authorized plaintiff to supply such materials. This plaintiff did as to the materials which he could obtain, and as shown in detail in the "Detailed Statement of Account" filed by plaintiff in this cause. [10]

B.

That on or about the 15th day of December, 1946, in front of the North Pole Bakery, Nome, Alaska, in the presence of plaintiff and another person, defendant Irene Gillette, in response to



an inquiry from plaintiff as to whether or not defendants had obtained certain needed materials for defendants' work at hand, defendant Irene Gillette replied, "No we haven't, and you can just let the whole thing go." That immediately thereafter, because of this order, plaintiff took his workmen from defendants' job and removed his tools.

That sometime after this order by Irene Gillette, and after plaintiff had removed his workmen and tools from defendants' work, defendant Ben F. Gillette made inquiry of as to when he would return and complete defendants' work. That Ben F. Gillette was then and there informed by plaintiff that he had been ordered off the work by Irene Gillette and that he was not returning to do any more work for defendants.

Wherefore, having replied to defendants' answer, plaintiff prays for judgment and decree in accordance with the prayer of his complaint.

/s/ C. C. TANNER,

Attorney for Plaintiff.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[11]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on the 26th day of December, 1947, before this court without a jury,

C. C. Tanner appearing for the plaintiff and O. D. Cochran appearing for the defendants, and evidence of both parties having been heard, the court reserved decision until the 29th day of March, 1948, at which time a memorandum of Findings and Conclusions was served upon both parties, counsel for defendants having died before such decision was made, and the attorney for plaintiff having since refused to make or file Findings of Fact, Conclusions of Law or Judgment herein, the Court being fully advised in the premises, now makes the following:

## FINDINGS OF FACT

### I.

That plaintiff is now and was at all times hereinafter mentioned, a contractor and builder, doing business at Nome, Alaska.

### II.

That defendants are now and were at all times hereinafter mentioned the owners of Lot 8, and the North 22 feet of Lot 7, Block 5, Nome, Alaska, and the owners of the dwelling house thereon. [12]

### III.

That on or about August 8, 1946, plaintiff undertook to pour a full concrete basement on the land described in paragraph two hereof and to move defendants' dwelling house from its then location on the south side of Front Street in Nome, Alaska, to the land described in paragraph two hereof. That said basement and the moving operations



were to be completed in October, 1946, at a cost of Two Thousand Eight Hundred Seventy-two and 28/100 (\$2,872.28) Dollars. That all materials were to be furnished by the defendants. That defendants paid plaintiff on account the sum of One Thousand (\$1,000.00) Dollars on October 10, 1946. That plaintiff did not complete the moving of the house in the month of October, 1946, but continued to work thereon from time to time until December 15, 1946, at which time he abandoned the work.

#### IV.

That on March 14, 1947, plaintiff filed his claim of lien for the sum of Two Thousand Seven Hundred Forty-six and 83/100 (\$2,746.83) Dollars, in which he gave credit to the defendants for One Thousand (\$1,000.00) Dollars advanced, his claim of lien being thereby reduced to One Thousand Seven Hundred Forty-six and 83/100 (\$1,746.83) Dollars; that said claim of lien was filed in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska.

#### V.

That after the abandonment by the plaintiff of the work on defendants' house, the defendants completed the full concrete basement which plaintiff had failed to complete at a cost to them in the sum of Three Hundred Twenty-seven and 50/100 (\$327.50) Dollars. [13]

#### VI.

That the plaintiff left the dwelling house of the defendants unbraced by reason of which it sagged

in the middle a distance of five inches and until the doors in the building would not open and the defendants were compelled to have said building raised and five bracing posts put thereunder and for which they expended the sum of One Hundred Ninety (\$190.00) Dollars.

#### VII.

That the defendants had thawed and excavated a sump, in the basement of said dwelling, and expended therefor the sum of Thirty-nine and 75/100 (\$39.75) Dollars, which said sump the plaintiff wantonly and negligently filled in and the same became a total loss to the defendants.

#### VIII.

That the plaintiff is not shown to be responsible for any damage to the concrete block chimney, for which defendants claim One Hundred (\$100.00) Dollars.

#### IX.

That the plaintiff is shown to be responsible for failure to complete the addition to said dwelling house to be used as a dining room, for which defendants claim Two Hundred Sixty (\$260.00) Dollars.

#### X.

That the plaintiff is not shown to be responsible for the removal of the Burks Pressure Pump for which defendants claim One Hundred Fifty (\$150.00) Dollars.

#### XI.

That plaintiff is not shown to be responsible for having left the basement of the dwelling open, or

for damage [14] by frost to the basement floor and the plumbing, for which defendants claim One Hundred Seven and 89/100 (\$107.89) Dollars.

## XII.

The plaintiff is not shown to be responsible for the cutting off one corner of the dwelling house, for which defendants claim One Hundred (\$100.00) Dollars.

## XIII.

That plaintiff is not shown to be responsible for negligently pouring the concrete basement walls without proper foundation, for which defendants claim the sum of Five Hundred (\$500.00) Dollars.

## XIV.

That plaintiff is not shown to be responsible for defendants' room rent, as alleged and claimed in paragraph XVII of the defendants' answer at Four Hundred Ten (\$410.00) Dollars, and defendants' board as alleged therein at Four Hundred Twelve (\$412.00) Dollars.

## XV.

That in the moving operations of the plaintiff, he furnished materials at the request of the defendants to the value of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

And from the foregoing Findings of Fact, the Court concludes:

## CONCLUSIONS OF LAW

### I.

That plaintiff is entitled to judgment against defendants for materials furnished by him at the

instance [15] of the defendants in the sum of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

## II.

That defendants are entitled to judgment against the plaintiff in the sum of Eight Hundred Seventeen and 25/100 (\$817.25) Dollars.

## III.

That no attorneys' fees or costs be allowed either party.

## IV.

That on settlement, the lien filed by plaintiff be discharged.

Dated at Nome, Alaska, this 27th day of August, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Aug. 27, 1948.

[16]

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In the District Court for the Territory of Alaska,  
Second Division.

No. 3737—Civil

W. M. GILLIS,

Plaintiff,

vs.

BEN F. GILLETTE and IRENE GILLETTE,  
Defendants.

## JUDGMENT

This cause having come on for trial on the 26th day of December, 1947, before the Court, without

a jury, C. C. Tanner appearing for the plaintiff and O. D. Cochran appearing for the defendants, and the Court having heard testimony of both plaintiff and defendants, and the arguments of counsel, and having reserved decision until the 29th day of March, 1948, at which time a memorandum of the Court's decision was served upon both parties, counsel for the defendants having died before such decision was made, and the attorney for plaintiff having since refused to make or file Findings of Fact, Conclusions of Law or Judgment herein, and the Court having now made and filed Findings of Fact and Conclusions of Law herein, and being fully advised in the premises, does now adjudge:

1. That the plaintiff is entitled to judgment against defendants for materials furnished by him at the instance of the defendants in the sum of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

2. That defendants are entitled to judgment against the plaintiff in the sum of Eight Hundred Seventeen and 25/100 (\$817.25) Dollars.

3. That no attorneys' fees or costs be allowed either party. [17]

4. That on settlement, the lien filed by plaintiff be discharged.

Dated at Nome, Alaska, this 27th day of August, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Aug. 27, 1948.

[18]

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named Plaintiff, W. M. Gillis, considering himself aggrieved by the Final Judgment of this Court made and entered in the above-entitled action on the 27th day of August, 1948, in favor of the Defendants and against the Plaintiff, for the sum of \$291.17, does hereby appeal from said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit: said Appeal being taken to the extent and for the reasons set forth in the Assignment of Errors, which is filed herewith,

Wherefore, Plaintiff prays that this Appeal be allowed: that a Citation issue to the Defendants in accordance with law: and that a Transcript of the record, proceedings and papers upon which the aforesaid Judgment was made be certified to and sent to the Appellate Court:

The Plaintiff Further Prays that the Court fix the amount of cost bond required of Plaintiff on Appeal.

Dated the 20th day of October, 1948.

C. C. TANNER,  
Attorney for Plaintiff,  
W. M. Gillis.

[Endorsed]: Filed Oct. 20, 1948.

[19]

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes Now W. M. Gillis, Plaintiff herein, and alleges that the Final Judgment made and entered in the above-entitled cause on the 27th day of August, 1948, is erroneous and unjust to him and is not in conformity with the Findings of Fact filed in said cause: and, in support of the foregoing allegations, he now sets forth the Assignment of Errors upon which he will rely on Appeal.

1.

For the purpose of this Appeal the Plaintiff accepts as true the Court's Findings of Fact and contends that the Court's Conclusion of Law and Judgment are not consistent with such findings as hereinafter set forth:

2.

The Court erred in not concluding as a matter of law that under the contract of labor between Plaintiff and Defendants, that Plaintiff was entitled to judgment for the contract cost of labor (\$2,872.28), minus the sum of \$1,000.00 paid on account, and the damages found owing to Defendants in the total sum of \$817.25. [20]

3.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for a reasonable attorney's fee designated by the Court.

4.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for the sum of \$1.95, the cost of filing his lien.



## 5.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for costs.

## 6.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to a judgment of foreclosure against Defendants' property described as Lot Eight (L. 8) and the North twenty-two feet (No. 22') of Lot Seven (L. 7), Block "B" (Bl. B), Nome, Alaska, for his unpaid labor bill in the sum of \$1,055.03, plus costs of materials furnished in the sum of \$526.08, plus a designated, reasonable attorney's fee, plus the lien filing fee of \$1.95, plus costs.

## 7.

The Court erred in not finding as a matter of law that Plaintiff was entitled to judgment for interest at the rate of 6% per annum on the sum of \$1,581.11 (labor bill of \$1,055.03, plus costs of materials furnished \$526.08) from the 16th day of December, 1946, until paid.

## 8.

The Court erred in not giving and entering judgment in favor of Plaintiff for labor performed in the sum of \$1,055.03; said sum being the difference between the contract price (\$2,872.28), minus the sum paid Plaintiff on account (\$1,000.00) and the damages allowed Defendants (\$817.25). [21]

## 9.

The Court erred in not giving and entering judgment in favor of Plaintiff for a designated, reasonable attorney's fee.



10.

The Court erred in not giving and entering judgment in favor of Plaintiff for his lien filing fee of \$1.95.

11.

The Court erred in not giving and entering judgment in favor of Plaintiff for his costs.

12.

The Court erred in not giving and entering judgment of lien foreclosure against Defendants' premises described as Lot Eight (L. 8) and the North twenty-two feet (No. 22') of Lot Seven (L. 7), Block "B" (Bl. B), Nome, Alaska, for the sum of \$1,581.11, plus the lien filing fee of \$1.95, plus a designated, reasonable attorney's fee, plus Plaintiff's costs.

13.

The Court erred in not giving and entering judgment in favor of Plaintiff for interest at the rate of 6% per annum on the sum of \$1,581.11 from the 16th day of December, 1946, until paid.

Wherefore, Plaintiff prays that said Judgment be reversed, revised, corrected and amended, all in accordance with the foregoing Assignment of Errors, and that the Plaintiff receive Judgment for that which is justly due him.

Dated this 20th day of October, 1948.

/s/ C. C. TANNER,

Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 20, 1948.

[22]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING  
AMOUNT OF COST BOND

This day came Plaintiff, W. M. Gillis, by his attorney, C. C. Tanner, and filed and presented his Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and his Assignment of Errors, and upon consideration thereof

It Is Now Ordered that said Appeal be, and the same is hereby allowed; and that the Plaintiff shall execute a bond for costs on appeal according to law in the sum which is hereby fixed at \$250.00:

It Is Further Ordered that a Citation issue to the Defendants in accordance with law:

It Is Further Ordered that a transcript of the record, proceedings and papers upon which Judgment in this cause was made be certified to and sent to the Appellate Court aforesaid.

Dated at Nome, Alaska, this 20th day of October, 1948.

/s/ JOSEPH W. KEHOE,

Judge of the District Court, for the Territory of  
Alaska, Second Division.

Presented by:

/s/ C. C. TANNER,

Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 20, 1948.

[23]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, W. M. Gillis, as principal, Joseph Wallace of Nome, Alaska, and Axel Edman of Nome, Alaska, as sureties, are hereby held and firmly bound unto Ben F. Gillette and Irene Gillette, above-named Defendants, in the sum of \$250, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of October, 1948.

The condition of the above obligation is such that:

Whereas, the above-named, bounden Plaintiff has filed his Petition of Appeal and is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Final Judgment made and entered by the Judge of the above-entitled Court, on the 27th day of August, 1948, [24] wherein the above-named Defendants were given Judgment against the above-named Plaintiff for the sum of \$291.17, and

Whereas, said Plaintiff is appealing from said Judgment to the extent and in accordance with his Assignment of Errors filed herein on appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse, revise, correct and amend said Judgment,

Now Therefore, if the Plaintiff, above-named, shall prosecute said appeal to effect and answer

all costs that may be adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ W. M. GILLIS,  
Principal.

/s/ JOSEPH WALLACE,  
Surety.

/s/ AXEL EDMAN,  
Surety.

United States of America,  
Territory of Alaska—ss.

Joseph Wallace and Axel Edman being first duly sworn, each for himself, says:

I am one of the sureties who executed the foregoing Bond on Appeal. I am a resident of Nome, Alaska. I am not a counselor or attorney at law, Marshal, Deputy Marshal, Commissioner, Clerk of any Court or other officer of any Court. I am worth the sum of \$500.00 over and above all my just debts and liabilities and exclusive of property exempt from execution.

/s/ JOSEPH WALLACE,  
/s/ AXEL EDMAN.

Subscribed and Sworn to before me this 28th day of October, 1948.

(Seal) /s/ C. D. ANDERSON,  
Notary Public in and for the Territory of Alaska,  
Residing at Nome. My Commission expires Oct.  
27, 1951.

The foregoing Bond is approved this 4th day of October, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Nov. 5, 1948.

[25]

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[Title of District Court and Cause.]

STIPULATION RE: PRINTING OF RECORD

It is hereby stipulated, by and between the above-named parties, that in printing the papers and records to be used on the hearing on Appeal in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and Cause in full and on all papers shall be omitted, except on the first page of said record and that there shall be inserted in place of said title on all papers used as a part of said records the words "Title of Court and Cause". Also, that all endorsements on said papers used as a part of said record may be omitted, except as to the Clerk's file marks and the admission of service.

Dated this 6th day of December, 1948.

W. M. GILLIS,  
By /s/ C. C. TANNER,  
His Attorney.

/s/ IRENE A. GILLETTE,  
/s/ BEN F. GLLETTE,  
Defendants.

[Endorsed]: Filed Dec. 23, 1948.

[26]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
TRANSCRIPT ON APPEAL

A Motion, supported by Affidavit, having on the 2nd day of December, 1948, been duly presented to the Court by W. M. Gillis, Plaintiff and Appellant herein, praying for an extension of time within which the Clerk of this Court may file Transcript on Appeal with the United States Circuit Court of Appeals at San Francisco, California, and the Court considering the Motion well taken,

It Is Now Ordered that the time for the filing of such Transcript be, and the same is hereby extended, up to and including the 17th day of January, 1949.

Dated this 2nd day of December, 1948.

/s/ JOSEPH W. KEHOE,  
United States District Judge.

[Endorsed]: Filed Dec. 2, 1948.

[27]

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[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: Norvin W. Lewis, Clerk of the above-entitled Court.

W. M. Gillis, Plaintiff and Appellant herein, hereby requests that you prepare transcript of record on Appeal in the above-entitled cause and file the transcript in the office of the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California:

A designation of the records and papers to be included in such transcript follows:

1. Complaint.
2. Plaintiff's "Detailed Statement of Account".
3. Answer.
4. Reply.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal and Fixing Cost Bond.
10. Cost Bond on Appeal.
11. Citation.
12. Stipulation on Printing of Record.
13. Praecipe.
14. Also, included in this transcript, any Order this Court may hereinafter make extending the time for filing the transcript. [28]

Please prepare this transcript as required by law and the rules and orders of this Court and the Circuit Court of Appeals for the Ninth Circuit, and forward same to the said Appellate Court at San Francisco, California, so that it may be docketed therein on, or before, the 13th day of December, 1948.

Dated this 8th day of November, 1948.

/s/ C. C. TANNER,

Attorney for Plaintiff and Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 23, 1948.

[29]



[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Territory of Alaska, Second Division—ss.

I, Norvin W. Lewis, Clerk of the District Court of the Territory of Alaska, Second Division, do hereby certify that the foregoing transcript on Appeal consisting of typewritten pages, from 1 to 29 both inclusive, is a true and exact transcript of the Complaint, Plaintiff's "Detailed Statement of Account", Answer, Reply, Findings of Fact and Conclusions of Law, Judgment, Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Cost Bond, Cost Bond on Appeal, Stipulation on Printing of Record, Order Enlarging Time to File Transcript and Praecipe in the case of W. M. (alias Bill) Gillis, Plaintiff vs. Ben F. Gillette and Irene Gillette, Defendants, No. 3737 this Court and of the whole thereof, as appears from the Records and Files in my Office at Nome, Alaska, and I further certify that the Original Citation on Appeal is annexed to this Transcript.

Cost of Transcript \$12.40 paid by C. C. Tanner, Attorney for Plaintiff, W. M. Gillis.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 31st day of December, 1948.

(Seal)            /s/ NORVIN W. LEWIS,  
Clerk.



[Title of District Court and Cause.]

CITATION ON APPEAL

To: The Defendants above-named, Ben F. Gillette and Irene Gillette, and to their attorney, whoever he may be,

Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within forty (40) days from the date of this Writ, pursuant to an Appeal filed in the Clerk's Office of the District Court of the Territory of Alaska, Second Division, wherein W. M. Gillis is Plaintiff and Appellant, and Ben F. Gillette and Irene Gillette are Defendants and Appellees, to show cause, if any there be, why the Final Judgment made and entered in said cause on the 27th day of August, 1948, should not be reversed, revised, corrected and amended in accordance with Appellant's Assignment of Errors filed on Appeal herein.

In Witness Whereof, I, Joseph W. Kehoe, Judge of the District Court, for the Territory of Alaska, Second Division, have hereunto set my hand the 4th day of November, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 23, 1948.

[Endorsed]: No. 12145. United States Court of Appeals for the Ninth Circuit. W. M. (alias, Bill) Gillis, Appellant, vs. Ben F. Gillette and Irene Gillette, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Second Division.

Filed January 4, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

**No. 12,145**

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

W. M. (alias Bill) GILLIS,  
(*Plaintiff*) *Appellant*,

VS.

BEN F. GILLETTE and IRENE GILLETTE,  
(*Defendants*) *Appellees*.

**BRIEF FOR APPELLANT.**

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**C. C. TANNER,**

Box 27, Nome, Alaska,

*Attorney for Appellant.*

FILED

SEP 26 1949

PAUL W. O'BRIEN



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No. 12,145

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

W. M. (alias Bill) GILLIS,  
(*Plaintiff*) *Appellant*,  
vs.

BEN F. GILLETTE and IRENE GILLETTE,  
(*Defendants*) *Appellees*.

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**BRIEF FOR APPELLANT.**

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**STATEMENT DISCLOSING BASIS OF JURISDICTION.**

48 U.S.C. Sec. 101, "There is established a District Court for the Territory of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. \* \* \*"

Compiled Laws of Alaska, 1933, Sec. 1994 (now CLA, 1949, Sec. 26-1-13),

"Actions to enforce the liens created by this code shall be brought before the district court, \* \* \*"

28 U.S.C. Sec. 1291,

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

courts of the United States, The District Court for the Territory of Alaska, \* \* \* except where a direct review may be had in the Supreme Court.”

The complaint (Trans. pp. 2 and 3), the answer (Trans. p. 9) and the Findings of Fact (Trans. p. 20) all disclose that the property involved in this action for lien foreclosure is in Nome, Alaska.

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#### **STATEMENT OF THE CASE—QUESTIONS INVOLVED.**

Appellant, W. M. (alias Bill) Gillis filed a lien on certain real property of the appellees, located in the Town of Nome, Alaska, and thereafter commenced this action to foreclose said lien under the provisions of Alaska statutes (Trans. p. 2 et seq.). Appellees answered and cross-complained (Trans. p. 9 et seq.) and Appellants made reply (Trans. p. 14 et seq.).

The case came on for hearing by the Court, without a jury, on the 26th day of December, 1947. The Court reserved decision until the 29th day of March, 1948, at which time a Memorandum of Findings and Conclusions was served upon both parties. Counsel for Appellees having died meanwhile, and counsel for Appellant having declined to make and file Findings of Fact and Conclusions of Law, the Court made and entered its Findings of Fact and Conclusions of Law and its Judgment on the 27th day of August, 1948. (Trans. p. 19 et seq.) Appellant then took this appeal.

The questions involved, as raised by Appellant's appeal and Assignment of Errors, are: (1) Whether the record and the Findings of Fact do not require Conclusions of Law and Judgment for plaintiff (Appellant); (2) Whether the record and the Findings of Fact do not require judgment foreclosing lien; or, (3) Whether further Findings of Fact are necessary to a complete decision on the questions involved.

---

#### **SPECIFICATIONS OF ERROR RELIED ON BY APPELLANT.**

1. The District Court erred in not concluding as a matter of law, that under the contract of labor between Appellant and Appellees, Appellant was entitled to judgment for the contract cost of labor (\$2,872.28), minus the sum of \$1,000.00 paid on account by Appellees, and minus the sum of the damages found owing to Appellees in the total amount of \$817.25 (a net total of \$1,055.03) in addition to the judgment for material furnished in the amount of \$526.08, and in not granting judgment accordingly.

2. The District Court erred in not concluding as a matter of law, that Appellant was entitled to judgment for the sum of \$1.95, the cost of filing his lien, and in not granting judgment accordingly.

3. The District Court erred in not concluding as a matter of law, that Appellant was entitled to judgment for a reasonable attorney's fee, in not designating said fee and in not entering judgment accordingly.

4. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment for costs, and in not entering judgment accordingly.

5. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment for interest at the rate of 6% per annum on the sum of \$1,581.11 (labor bill of \$1,055.03 plus cost of materials furnished \$526.08) from the 16th day of December, 1946, until paid, and in not granting judgment accordingly.

6. The District Court erred in not concluding as a matter of law that Appellant was entitled to judgment of foreclosure against Appellees' property described as Lot Eight (8) and the North Twenty-two feet (N. 22') of Lot Seven (7), Block "B", Nome, Alaska, for the unpaid balance of the contract cost of labor (\$1,872.28), for the material furnished by Appellant outside the contract (\$526.08) for the cost of filing Appellant's lien (\$1.95) for a reasonable attorney's fee and for Appellant's costs, minus the damages allowed Appellees (\$817.25), and in not granting judgment accordingly.

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## ARGUMENT OF THE CASE.

### SUMMARY.

This appeal from the final judgment of the District Court in a lien foreclosure suit, was taken by Appellant on the contention that the Conclusions of Law

and Judgment entered are not the Conclusions of Law and Judgment required by the record and Findings of Fact in the Case.

The action for foreclosure of a Mechanic's Lien was brought under the provisions of Chapter XXXIX, Article I, Secs. 1982 through 1994 incl., and Article VIII, Secs. 2081, 2082 and 2083, Compiled Laws of the Territory of Alaska, 1933 (said laws now being found under Title 26 of Alaska Compiled Laws, 1949).

---

#### THE AMOUNT OF THE JUDGMENT.

Appellant brought this action for the reasonable worth of labor and material furnished (Complaint, Par. 1—Trans. pp. 1 and 2). Appellees answered and claimed a contract for a price certain of \$2,872.28 (on which \$1,000.00 is admitted to have been paid) with all materials to be furnished by Appellees. (Answer, Par. V—Trans. pp. 10 and 11). Appellees further made claim for eleven items of damages totalling \$2,597.14, for Appellant's breach of contract (Answer, Par. VIII through Par. XVIII—Trans. pp. 12, 13 and 14) and prayed for judgment against Appellant for \$724.86 (Trans. p. 14). This prayer for judgment was obviously the difference between the unpaid contract balance of \$1,872.28 and Appellees' prayer for damages of \$2,597.14.

Appellant by his Reply (Trans. pp. 14 through 19, incl.) admitted that the estimated labor cost was \$2,872.28, and denied the claims for damages.

It is apparent from Appellant's Detailed Statement of Account (Trans. pp. 7, 8 and 9) and from the nature of the damages claimed by Appellees' Answer (Trans. pp. 12, 13 and 14) that the major portion of the work originally contemplated had been done prior to the time Appellant ceased work.

The Court found "That said basement and the moving operations were to be completed in October, 1946, at a cost of Two Thousand Eight Hundred Seventy-two and 28/100 (\$2,872.28) Dollars. That all materials were to be furnished by the defendants. That defendants paid plaintiff on account the sum of One Thousand (\$1,000.00) Dollars on October 10, 1946." (Findings of Fact—Trans. pp. 20 and 21.) The Court then proceeded to dispose of each of Appellees' claims for damages by finding that Appellees were entitled to certain damages for the completion of the basement, for the bracing of the building, for the filling in of the sump by Appellant, and for the failure of Appellant to complete the addition to the dwelling house, said damages being in the total sum of \$817.25, and that Appellees were not entitled to the other damages claimed. (Findings of Fact, Par. V through XIV incl.—Trans. pp. 21, 22 and 23.) There is no finding by the Court as to what part, if any, of the damages incurred by Appellees were for the cost of materials which they had to use in completing the job.

It is significant to note that whether the problem is approached from Appellant's contention of the reasonable worth of the labor performed, of the value of \$2,220.75 (Trans. p. 9), or from the contentions of



the Appellees as found by the Court that there was a contract for a price certain, and that Appellee is entitled to damages for the failure to complete the said contract, that substantially the same result is reached.

*Appellant's Claim*

Reasonable value of labor	\$2,220.75
Less payment on account	1,000.00
	<hr/>
	\$1,220.75
Plus Cost of material	526.08
	<hr/>
	\$1,746.83

*Court's Finding on Appellees' Claim*

Contract price	\$2,872.28
Less damages allowed	817.25
	<hr/>
	\$2,055.03
Less payment on account	1,000.00
	<hr/>
	\$1,055.03
Plus Cost of Material	526.08
	<hr/>
	\$1,581.11

The *Net Difference* is only \$165.72.

It seems apparent that all or a portion of this small difference might well have been made up of the cost of materials used by Appellees in completing the work, the cost of which they would have had to have borne in any event. Appellant feels that the court erred in not making a specific finding on this point, but the error is not here urged.

While the record does not disclose a specific admission by Appellees of Appellant's claim for the unpaid

labor and material bill of \$1,746.83, the affirmative plea contained in Paragraph V of the Answer (Trans. p. 11) "all materials were to be furnished by the defendants and for which the defendants promised and agreed to pay to the plaintiff the sum of \$2,872.28", when coupled with Appellees' prayer for judgment for the difference between the unpaid balance of \$1,872.28 and Appellees' claimed damages of \$2,597.14 amounts to an admission by Appellees that there is due and owing Appellant the sum of \$1,872.28 for labor on the contract, less only the damages allowed plaintiff.

Since the court followed the method contended for by Appellees of finding a contract and allowing damages for its breach, rather than following Appellant's claim for the value of only the work done, the conclusion is unescapable that under Appellees' answer and the findings of the court judgment should have been entered against Appellees, for the sum of \$1,581.11.

---

#### RIGHT TO ATTORNEY'S FEES AND COSTS.

Compiled Laws of Alaska, 1933, Section 1119 (now CLA, 1949, sec. 26-1-13) reads in part as follows:

"In all actions under this chapter the district court shall, upon entering judgment for the plaintiff, allow as a part of the costs all moneys paid for the filing and recording of the lien, also a reasonable amount as attorney's fees. \* \* \*"



The mandatory phrasing of the statute evidences the attitude of the congress. The fee is not fixed and determined by the statute but is left to the court and is not penal in its nature but is in the nature of a cost to insure to the lien claimant payment for his labor and material without diminution by the costs of collection.

The principle and constitutionality of allowing attorney's fees in a lien foreclosure proceedings has been upheld by at least two cases in this court arising under the Alaska Law. *Cascaden v. Wimbish*, 161 F. 241, 88 CCA 277, and *Pioneer Mining Co. v. Delamotte*, 185 F. 752, 108 CCA 90.

---

#### RIGHT TO INTEREST.

Compiled Laws of Alaska, 1933, Sec. 1871, as amended by Laws 1935, Chap. 32, Sec. 1, p. 84 and Laws 1939, Chap. 31, Sec. 1, p. 106 (now CLA, 1949, Sec. 25-1-1) reads in part as follows:

“The rate of interest in the Territory of Alaska shall be six per centum per annum, and no more, on all moneys after the same become due; \* \* \*”

Upon the cessation of the work here involved, the money therefor became due Appellant. It has been held, in *New York Alaska Gold Dredging Co. v. Walbridge*, 38 F. (2d) 199, that interest at the legal rate ran from the time it became due, and was not qualified by a later clause referring to judgments and decrees. That if a judgment is entered it is for money which became due at the time the cause of action arose.

The principles of and necessity for allowing interest is well set out in that case wherein they quote at length from *Curtis v. Innerarity*, 6 How. (47 U.S.) 146, 154, 12 L. Ed. 380 on the necessity of allowing interest to compensate for money wrongfully withheld.

---

#### THE RIGHT TO A FORECLOSURE OF LIEN.

A good general statement of the traditional, and correct, attitude of the courts toward mechanics' liens is found in Vol. 33 Am. Jur. 423, paragraph 8, Policy of law as to liens:

“Both policy and morality require that liens, whether by contract of the parties or by operation of law, should be sustained whenever it is possible without violation of positive law, inasmuch as they are of too sacred a character to be divested or even impaired by vague and uncertain implications. However, the lien which the law favors is the specific or particular lien. \* \* \*”

The Alaskan law, which was adopted from Oregon Law, is of comprehensive scope. Compiled Laws of Alaska, 1933, Sec. 1982 (now CLA, 1949, Sec. 26-1-1) reads as follows:

“Persons Entitled to Lien for Work or Labor Done or Material Furnished. Every mechanic, artisan, machinist, contractor, lumber merchant, laborer, teamster, drayman and other person performing labor upon or furnishing material of any kind to be used in the construction, alteration or repair, either in whole or in part, of any building, wharf, bridge, flume, fence, machinery or

aqueduct, or any structure or superstructure, shall have a lien upon the same for the work or labor done or material furnished at the instance of the owner of the building or other improvement or his agent.”

In the case of *Arctic Lumber Co. v. Borden*, 211 Fed. 50, the court quotes the opinion of Judge Sanborn in *Hooven, Owens & Rentschler Co. v. John Featherstone Sons*, 111 Fed. 81, 49 C.C.A. 229 as follows:

“Labor and material once bestowed lose all their value to the laborer or materialman. He cannot take them back. They enhance the value of the property upon which they are placed, and its owner and those who take under him receive all the benefits of the labor and material. In such circumstances the lien of the laborer or materialman should be maintained to the full extent to which the statute gives it.”

Further authority for a liberal construction of lien law, arising out of Alaska, is to be found in *Russell v. Hayner*, 130 Fed. 90 where it was said

“The act relating to mechanics’ liens should be liberally construed. The evident spirit and purpose of the act is to do substantial justice to all the parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality. (Citing cases.) But in following this rule courts should always be careful not to impair the force of the statute or fritter away its meaning by construction. \* \* \*”

The District Court found that Appellant continued his work on the house until December 15, 1946, and

that on March 14, 1947 the claim was filed in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska. (Trans. p. 21.) This is equivalent to a finding that requirements of Alaska law requiring the filing of a claim of lien within 90 days of cessation of labor in the recorder's office in the Precinct and Division where the work was performed had been met. The applicable law is found in Compiled Laws of the Territory of Alaska, 1933, Sec. 1987 as amended by C.L.A. 1943, Chapter 21 (now C.L.A., 1949, Sec. 26-1-5):

“Lien Claim: Time and place of filing: Contents: It shall be the duty of every original contractor, after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, claiming the benefit of this article, within ninety days after the completion of his contract or the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts.”

## SUFFICIENCY OF THE FINDINGS OF FACT.

Compiled Laws of the Territory of Alaska, 1933, Sec. 3870 as Amended Laws 1937, Chap. 44, Sec. 1, p. 113 (now CLA, 1949, 55-8-2) reads:

“Findings and Conclusions by Court: Proceedings: Reference. All issues of fact in actions of an equitable nature may be tried by the Court, the evidence shall be presented and the trial conducted in the same manner as other actions; provided, the Court may, in its discretion, refer the case to a referee pursuant to the provisions of this title. In all such actions the Court, in rendering its decisions therein, shall set out in writing its findings of fact upon all material issues of fact presented by the pleadings, together with its conclusions of law thereon; but such findings of fact and conclusions of law shall be separate from the judgment and shall be filed with the clerk, and shall be incorporated in and form a part of, the judgment roll of the case; and such findings of fact shall be subject to review by the appellate tribunal, and may be amended to conform to the evidence. Exceptions may be taken during the trial to the ruling of the Court, and also to its findings of fact, and a statement of such exceptions prepared and settled as in an action and within the same time.”

From Compiled Laws of Alaska, 1933, page 715, chapter LXXXII, “Issues and Trial”, Section 3544:

“When Issue of Law and Fact Arise, Issue of Law to be First Tried. Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In such cases the issues



of law shall be first tried, unless the court otherwise directs”.

American Jurisprudence, Volume 53, page 788, section 1134—Matters Required to be Found:

“With respect to the matters upon which a Court trying a case without a jury must make findings, the general rule is that while the Court is not required to make findings on immaterial issues, it *must make findings on every material issue presented by the pleadings and supported by the evidence*”.

American Jurisprudence, Volume 53, page 794, paragraph 1139:

“findings of fact by the trial court should be definite and certain, and in such form as to dispose of material issues, and not negative in such form as not to dispose of the matter. A finding must be sufficient in itself without inferences or comparisons or balancing of testimony or weight of evidence.”

American Jurisprudence, Volume 19, reading from section 408, at page 280, “Pleadings and Proof as Basis of Decree”:

“According to the general rule, a decree must be responsive to, or in conformity with the pleadings and the proof which has been adduced in support thereof; otherwise, it may be held to be invalid and ineffectual and may be treated as a nullity even in a collateral proceeding”.

American Jurisprudence, Volume 19, page 280, footnote 16:

“A decree granting relief must be based either on the bill and the admissions of the answer or on the bill and the proof sustaining the cause made in the bill. A decree cannot be based on allegations without pertinent proof or on proof without corresponding allegations. The relief granted must always be in conformity with the case made in the pleadings and established by the proof, and relief cannot be granted that is at variance with either”.

However there is authority that where the findings do not fully meet the requirement of the statute, they may nevertheless contain enough to enable the Appellate Court to dispose of the appeal. *Roberts v. Date*, 123 Fed. 238, 59 C.C.A. 242.

And in *Dalton v. Hazelet*, 182 Fed. 561, 105 C.C.A. 99, the court said at 182 Fed. p. 570:

“The absence of a proper bill of exceptions leaves the case open for consideration upon the pleadings, findings of fact, conclusions of law, and decree under which the substantial merits of the case will be determined.”

The foregoing appears to Appellant to leave this Court but two alternatives: (A) Remand the case for further proceedings and the entry of findings in compliance with the statute, or (B) take the record containing the pleadings, findings of fact, conclusions of law, and judgment, consider the case and grant Appellant judgment for the sum of \$1,581.11, allow him a reasonable attorney's fee and his costs, and enter a judgment of foreclosure against the property of the Appellees hereinbefore described.

It is Appellant's view that there is no basis in the record, at any point, for denying Appellant judgment for his labor bill. As has been pointed out, there is in Appellees' pleadings, an admission of a contract. The positive Findings of Fact denying Appellee his claimed damages, except to the extent of \$817.25, leave the record without basis for denying Appellant recovery, either on his claim for the reasonable value of labor, or on the contract for labor.

Likewise, while the record is not as clear as might be desired on Appellant's right to his lien, nor as to his compliance with all statutory and technical requirements, Appellant finds nothing in the record from which it can be said positively that the lien has been lost or destroyed.

Dated, Nome, Alaska,  
April 27, 1949.

Respectfully submitted,

C. C. TANNER,

*Attorney for Appellant.*



No. 12,145

IN THE

United States Court of Appeals

For the Ninth Circuit

---

W. M. (alias Bill) GILLIS,  
*(Plaintiff) Appellant,*

vs.

BEN F. GILLETTE and IRENE GILLETTE,  
*(Defendants) Appellees.*

BRIEF FOR APPELLEES.

---

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*Attorney for Appellees.*

FILED

MAY 10 1945

PAUL P. O'BRIEN,  
CLERK



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### QUESTIONS INVOLVED.

1. Does the abandonment of a contract by a contractor,
  - (a) constitute a bar to his enforcement of a lien for work performed, and
  - (b) prevent him from obtaining any of the benefits of the lien statutes?

No. 12,145

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

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W. M. (alias Bill) GILLIS,  
*(Plaintiff) Appellant,*

VS.

BEN F. GILLETTE and IRENE GILLETTE,  
*(Defendants) Appellees.*

**BRIEF FOR APPELLEES.**

---

*May it please the Court:*

Appellant appeals from the trial court judgment rendered in an action to foreclose a lien on property situate in Nome, Alaska. (Tr. 26.) The court, in its judgment, gave plaintiff (appellant) judgment in the sum of five hundred twenty-six and 08/100 dollars, and gave defendants (appellees herein) judgment in the sum of eight hundred seventeen and 25/100 dollars. Plaintiff was denied the right to foreclosure on the alleged contractor's lien. (Tr. 24.)

**QUESTION ON APPEAL.**

Appellant urges that from the record and findings of fact it is required that conclusions of law and judgment should be for plaintiff (appellant). He asserts that there is no basis in the record, at any point, for denying him judgment for his labor bill. The question is: Does an abandonment of a contract by a contractor constitute a bar to his enforcement of a lien for work performed, and prevent him from obtaining any of the benefits of the lien statutes?

---

**FACTS.**

Plaintiff, appellant herein, contracted with the defendants, appellees, to pour a concrete basement and move defendant's house from one lot to another. The contract provided that work was to be completed in October, 1946, at a cost of \$2,872.28. Defendants paid plaintiff \$1,000.00 on account. Plaintiff did not complete the moving of the house in the month of October, but continued thereon from time to time until December 15, 1946, at which time he abandoned the work. (Tr. 20, 21.) On the 14th day of March, 1947, plaintiff filed a claim of lien for the sum of \$2,746.83, less the \$1,000.00 advanced by defendants, in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska. (Tr. 21.)

Under the contract, which plaintiff abandoned, all materials were to be furnished by defendants. (Tr. 21.) In the moving operations, plaintiff furnished ma-

terials to the value of \$526.08. For this material, plaintiff recovered judgment. (Tr. 23, 25.)

On the 13th day of September, 1947, the plaintiff filed his complaint (Tr. 2) wherein he demanded judgment against the defendants in the sum of \$1,746.83 for the reasonable value of labor and materials, with interest at 6% per annum from December 16, 1946; for \$1.95, cost of filing lien; for a reasonable attorney's fee; and costs of suit; and that the premises be sold under a decree of the trial court.

Defendants' answer and cross-complaint alleged that an agreement was entered into by plaintiff and defendants, and that plaintiff was guilty of breaching the contract, and further that in the latter part of January, 1947, plaintiff advised the defendants that he was going to do nothing further in connection with the moving of the residence of defendants, or the completion of the concrete basement therefor.

Appellant's reply was filed on December 11, 1947, the cause was tried before the court without a jury on the 26th day of December, 1947. The trial court on the 27th day of August, 1948, made its findings of fact and found that a contract existed between the parties and that the plaintiff had abandoned the work. (Tr. 21.) In its conclusions of law and judgment (Tr. 25), plaintiff was given judgment against defendants for \$526.08, and defendants were given judgment against plaintiff in the sum of \$817.25. The net recovery for defendants was \$291.17. (Tr. 26.)

## ARGUMENT.

Each of the appellant's points in his brief is predicated upon the assumption that he is entitled to the benefits of the lien statutes despite his abandonment of the contract. Since we claim that this assumption is erroneous, we will here dispose of all of his points under a single heading.

---

### I.

#### ABANDONMENT OF A CONTRACT BY A CONTRACTOR CONSTITUTES A BAR TO HIS ENFORCEMENT OF A LIEN FOR WORK PERFORMED.

There appears to be no Alaska case directly in point. The Alaska lien law, as appellant admits (App. Br. p. 10), was adopted from the Oregon law. (*Carter's Annotated Alaska Codes*, "Introduction" and note to Sec. 262, p. 409; also *Kohn v. McKinnon*, 90 F. 623.) The Oregon court had the identical question presented to it in several cases.

We propose now to examine into the Oregon court's disposition of the question; but before so doing we digress momentarily to observe a legal definition of the word, "abandonment".

Abandonment is a composite fact, one element visible and the other sounding in intention or motive. It is a fact made up of an intention to abandon, and the external act by which the intention is carried into effect. The two elements must conjoin and operate together or there can be no abandonment. (*Pocoke v. Peterson*, 165 S.W. 1017, 1021, 256 Mo. 501.)



Under the Oregon law one may not recover the reasonable value of his services for another on a special contract, if there has been a failure to comply with the contract, and there has been a wilful or voluntary abandonment.

In *Pippy v. Winslow*, 62 Oregon 219, 222; 125 Pac. 298, 299 (1912), the court said:

“Where the contractor fails to perform a considerable part of the work required by the contract, his failure, irrespective of whether his intention were good or bad, constitutes a bar to his enforcement of a lien for the work performed. If defects show that the contractor performed the work in a slovenly and improper manner, not conforming substantially with the plans and specifications and thereby defeating the intentions of the parties to have the work done in a particular manner, the contractor, unless there has been a waiver, cannot enforce a lien. The wilful omission, though in an unimportant respect, will preclude the assertion of a lien by him. The spirit of the contract should be faithfully observed, though the letter thereof fail. (20 *Am. & Eng. Enc. of Law* (2d ed.) 367; *Glacius v. Black*, 50 NY 145 (10 Amer. Rep. 449); *Anderson v. Peterreit*, 86 Hun. 600 (33 NY Supp. 741); *Perry v. Quackenbush*, 105 Cal. 299 (38 Pac. 740).” *Birkemeier v. Nobel*, 149 Ore. 292 at 308 (40 P. (2d) 694).

Also in *Tribou and McPhee v. Strowbridge*, 7 Ore. 156, the Oregon court, at page 160, said:

“We think the rule in this state is, that where one performs service for another on a special

contract, and for any reason *except a voluntary* abandonment, fails to fully comply with his contract, and such compliance becomes impracticable, and the service has been of value to him for whom it was rendered, he may recover for such service the reasonable value." (Italics ours.)

And in the Oregon case of *Bradfield v. Bollier*, 169 Ore. 425, 128 P. (2d) 942, foreclosure of a mechanic's lien, and abandonment of a contract, at page 432, the Oregon court said:

"The instant case is one in which the original contractor abandoned construction and whether he would be entitled to a lien or any other affirmative relief would depend upon whether the abandonment occurred under such circumstances as to come within the exception to the general rule that a *wilful* abandonment is a bar to any recovery. (*Tribou v. Strowbridge*, 7 Ore. 156; *Steeple v. Newton*, 7 Ore. 110, 33 Amer. Rep. 705; *Todd v. Huntington*, 13 Ore. 9, 4 P. 295; *Move v. Island City M. & M. Co.*, 19 Or. 363, 24 P. 521; *Murray's Estate*, 56 Or. 132, 107 P. 19; *West v. McDonald*, 64 Or. 203, 127 P. 784, 128 P. 818; *Wuchter v. Fitzgerald*, 83 Or. 672, 163 P. 819; *Easton v. Quackenbush*, 86 Or. 374, 168 P. 631; *Espenhain v. Barker* (*Phillips v. Barker*), 121 Or. 621, 256 P. 766; *Rose v. U. S. Lumber & Box Co.*, 108 Or. 237, 215 P. 171; *Wolke v. Schmidt*, 112 Or. 99, 228 P. 921; *State v. U. S. Fidelity Co.*, 144 Or. 535, 24 P. 2d 1037." (Italics ours.)

It thus appears that the findings of fact, in view of the one on abandonment, not only support the conclusions of law, as set forth by the trial court, but

also support the judgment of the trial court with respect to appellant's claim for work and labor, in denying any recovery on or off the contract.

Since appellant has not shown himself entitled to a lien, he is barred from receiving the benefits of the statute which give a successful plaintiff his costs of filing the lien, his attorney's fees and his costs.

---

### CONCLUSION.

We have thus shown that when the trial court found in its findings of fact that a contract existed, and that appellant abandoned his contract, it is justified and proper for it to conclude, as a matter of law, that he is not entitled to relief upon the contract or any benefit from the Alaska mechanic's lien statute.

We therefore respectfully submit that no other conclusions of law or judgment could properly result from the findings of fact of the trial court; that the record and findings of fact do not require judgment foreclosing the lien; and that further findings of fact are unnecessary to a complete decision on the question involved. The judgment should therefore be sustained.

Dated, San Francisco, California,  
May 13, 1949.

Respectfully submitted,

CHELLIS CARPENTER,

*Attorney for Appellees.*



No. 12,145

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

W. M. (alias Bill) GILLIS,  
(*Plaintiff*) *Appellant*,

VS.

BEN F. GILLETTE and IRENE GILLETTE,  
(*Defendants*) *Appellees*.

REPLY BRIEF FOR APPELLANT.

---

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CLERK



No. 12,145

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

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W. M. (alias Bill) GILLIS,  
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VS.

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*(Defendants) Appellees.*

---

**REPLY BRIEF FOR APPELLANT.**

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Upon careful reading of Appellees' Brief and an examination of the authorities cited, it will be noted that the entire Brief is predicated upon Section 1987 of the Compiled Laws of Alaska, 1933, which was originally taken from the Carter Code of Oregon, which reads as follows:

“Lien Claim to be Filed When. It shall be the duty of every original contractor, within ninety days after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person *save the original contractor*, claiming the benefit of this article, within sixty days after the completion of the alteration or repair thereof, or after he has

ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts. (695-CLA; 1-5-15)."

However, the Legislature of the Territory of Alaska later amended the above Section and the Section as it reads now and did at the time of the filing of the Appellant's Lien is as follows (A.C.L.A. 1949):

"26-1-5. Lien Claim: Time and Place of Filing: Contents. It shall be the duty of every original contractor, after the completion of his contract, and of every mechanic, artisan, machinist, builder, lumber merchant, laborer, or other person, claiming the benefit of this article, within ninety days after the completion of his contract or the alteration or repair thereof, or after he has ceased to labor thereon from any cause, or after he has ceased to furnish materials therefor, to file with the recorder of the precinct in which such building or other improvement, or some part thereof, shall be situated, a claim containing a true statement of his demand, after deducting all just credits and offsets, with the name



of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, and also a description of the property to be charged with the lien sufficient for identification, which claim shall be verified by the oath of himself or of some other person having knowledge of the facts. (CLA 1913, sec 695; am L 1915, ch 5, p 5; CLA 1933; sec 1987; am L 1943, ch 21, sec 1, p 86.)”

It will be noted that in the foregoing amended section “save the original contractor” *has been omitted*, thus giving to the original contractor the benefit of the law which reads “ \* \* \* or if he has ceased to labor thereon from *any cause* \* \* \*” so, under the provisions of the law as it was at the time Appellant filed his lien, and now is, Appellant had a right of lien for his labor performed.

Regardless, however, of the question as to whether or not the Appellant is entitled to a lien for the labor performed under the contract, it appears that he is entitled to a judgment for the balance owing under the contract in the sum of \$1,055.03 (Appellant’s opening brief) and a lien upon the Defendants’ property for *materials furnished* in the sum of \$526.08, the same being *no part of the contract for labor* (Defendants were to furnish all materials—Trans. of Rec. p. 10, par. V; p. 20, par. III).

The trial court gave judgment to the Plaintiff (Appellant) for the materials furnished in the sum alleged of \$526.08 (Trans. of Rec. p. 25, 1) and in his judg-

ment recognized that a valid lien existed (Trans. of Rec. p. 25, 4).

Therefore it appears that the Appellant is entitled to a lien, and a judgment of lien foreclosure, and under the lien laws of Alaska, as pointed out in Appellant's opening brief, it follows that he is entitled to attorney's fees, cost of preparing and filing his lien, costs of action and interest.

Irrespective, however, of the lien laws of Alaska the Appellant is entitled to attorney's fees and costs by virtue of section 55-11-55 A.C.L.A. 1949.

Dated, Nome, Alaska,  
June 17, 1949.

Respectfully submitted,

C. C. TANNER,

*Attorney for Appellant.*

No. 12145

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United States  
Court of Appeals  
for the Ninth Circuit.

---

W. M. (Alias, BILL) GILLIS,

Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,

Appellees.

---

Transcript of Record

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Appeal from the United States District Court,  
for the District of Alaska,  
Second Division

FILED

MAY 4 1950

PAUL P. O'BRIEN, V



No. 12145

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United States  
Court of Appeals  
for the Ninth Circuit.

---

W. M. (Alias, BILL) GILLIS,

Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,

Appellees.

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Transcript of Record

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Appeal from the United States District Court,  
for the District of Alaska,  
Second Division



## INDEX

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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IRENE GILLETTE,  
CHELLIS CARPENTER,  
Mills Building,  
San Francisco, California.

In the District Court for the Territory of Alaska  
Second Division

No. 3737

W. M. (Alias, BILL) GILLIS,

Plaintiff,

vs.

BEN F. GILLETTE and IRENE GILLETTE,

Defendants,

### COMPLAINT

Plaintiff complains of defendants and for cause of action alleges:

1.

That plaintiff is now, and was at all times hereinafter stated, a contractor and builder doing business as such at Nome, Alaska, and that as such contractor and builder, on and between the 10th day of September, 1946, and the 15th day of December, 1946, at the special instance and request of defendants (owners) and upon their promises to pay the reasonable value thereof, the plaintiffs performed work and labor and furnished and supplied work, labor and materials, to the defendants, in and about the removal of a frame dwelling house owned by the defendants, from Lot 1, Block L, to Lot 8, and the north 22 feet of Lot 7 in Block B, Nome, Alaska, also owned by the defendants, and the erection, alteration and repair of said building upon its new location on Lot 8 and the north 22 feet of Lot 7, Block B, aforesaid, where it is now situate; that the said labor was performed and

said materials were furnished to be used, and were actually used, in the removal, erection, alterations and repairs of said dwelling house; and that said labor and materials were of the reasonable worth and value of \$2,746.83.

2.

That the defendants were, at the dates hereinbefore mentioned, and still are, the owners and reputed owners of the premises described as Lot 8 and the north 22 feet of Lot 7, all in Block B, Nome, Alaska, as hereinbefore mentioned; and that the said premises, and the whole thereof, are required for the convenient use and occupation of said dwelling-house.

3.

That the last date upon which said work and labor of removing, altering, erecting and repairing said building was performed, and said materials were furnished, is December 15, 1946.

4.

That the plaintiff duly filed, as required by law, his claim for a lien for the amount due and owing him as aforesaid from said defendants, in the office of the recorder for the Cape Nome Precinct, Second Division, Alaska, on the 14th day of March, 1947, and within ninety days from the date the last labor was performed and materials furnished as aforesaid, which claim for lien was duly signed and verified by the claimant, plaintiff herein; A true copy of this said claim of lien is attached hereto and marked Exhibit A, and form a part of this

complaint to the same extent as though it were set forth at large herein.

## 5.

That no part of the price or reasonable value of said labor and materials has been paid, except the sum of One Thousand Dollars (\$1,000.00); that plaintiff has several times made demand upon defendants for the balance due and owing as aforesaid, but the defendants refused to pay, and do now refuse to pay the same; and that there is now due and owing to the plaintiff from said defendants on account of performing labor and furnishing labor and materials, as aforesaid, the sum of One Thousand Seven Hundred Forty-Six Dollars and Eighty-three cents (\$1,746.83), with interest thereon at the rate of six per cent per annum from December 16th, 1946.

Wherefore, plaintiff prays judgment against defendants and each of them, [1\*] for the sum of \$1,746.83, with interest at 6% per annum from December 16th, 1946; for \$1.95, cost of filing lien; for a reasonable attorney's fee; and costs of suit; and that the said premises described as Lot 8 and the north 22 feet of Lot 7, Block B, Nome, Alaska, be sold under the decree of this court, according to law and the proceeds be applied in payment of said judgment; and that in case of deficiency arising from such sale, that the plaintiff have judgment for such deficiency and have execution thereof; and

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



for such further relief as may be just and equitable.

/s/ C. C. TANNER,

Attorney for Plaintiff. [2]

(Duly Verified.)

## EXHIBIT A

### NOTICE OF CLAIM OF LIEN ON REAL PROPERTY

Notice is hereby given that a short time prior to Sept. 10th, 1946, Mr. Ben F. Gillette and Irene, his wife, of Nome, Alaska, employed and authorized Bill Gillis of Nome, Alaska, to remove a certain frame dwelling house owned by them, from Lot 1, Block L, Nome, Alaska, to premises owned by them in Nome, Alaska, and described as Lot 8, and the North 22 feet of Lot 7; to place, erect, alter and repair said building on its new location; and to furnish and supply the necessary labor, and the locally available materials necessary and practicable to accomplish the desired results.

That the said Bill Gillis commenced the employment aforesaid the 10th day of Sept., 1946, and ended such employment, and the furnishings of labor and materials, as aforesaid, on the 15th day of December (inclusive), 1946.

That under and by virtue of said employment the said Bill Gillis furnished and supplied 987 hours of labor at the regular and reasonable cost and charge of \$2,220.75; and materials, which actually went into the construction, alteration and repair of the aforementioned building, at the actual cost and

reasonable charge of \$526.08: Making a total cost and charge for labor and materials of \$2,746.83.

That the sum of \$1,000.00 has been paid on this account, leaving a balance now due and owing of \$1,746.83, after allowing and deducting all credits and offsets.

That a lien is claimed by Bill Gillis for the aforesaid sum of \$1,746.83, against the premises in Nome, Alaska, described as Lot 8, and the North 22 feet of Lot 7, all in Block B, including the residence building situate and located thereon.

That the premises against which this lien is claimed, are owned by Ben F. Gillette and Irene, his wife, of Nome, Alaska.

/s/ BILL GILLIS,  
Lien Claimant.

United States of America,  
Territory of Alaska—ss.

Bill Gillis, being first duly sworn on oath deposes and says: I am claimant named in the foregoing claims of lien. I have read and know the contents thereof. All things stated therein are true as I verily believe.

/s/ BILL GILLIS,

Subscribed and Sworn to before me the 14th day of March, 1947.

[Seal] /s/ C. C. TANNER,  
Notary Public for Alaska.

My Commission expires July 18, 1950.

[Endorsed]: Filed Sept. 13, 1947. [3]

[Title of District Court and Cause.]

## DETAILED STATEMENT OF ACCOUNT

Comes now plaintiff herein and files detailed items of the account sued upon in this action and particularly in reference to paragraph 1 of the Complaint:

### A. Items of Labor

(1) Wrecking, cleaning off and removing unsuitable concrete foundation forms prepared by Bud Harper for new location of house on Lot 8 and the No. 22 ft. of Lot 7, Block B, Nome, Alaska.

(2) Backfilling of basement on new house location to bring footing level to grade as specified and ordered by owners.

(3) Erecting on new house location, footing and wall concrete forms for full basement, plus an addition as specified by owners; all of which included the hauling and installing of reinforcement iron.

(4) Mixing, and pouring concrete to grade as specified by owners for footings and 9 in. basement walls.

(5) Stripping forms and removal of same after the pouring and setting of concrete.

(6) Raising house from old foundation on Lot 1, Block L, Nome, Alaska, and placing same on skids, preparatory to removal to new location.

(7) Moving house to new location.

(8) Raising, lining up and placing house on new location foundation.

(9) Framing a new addition to house on its new location and installing in connection therewith

a triple window frame and three sash, an outside door frame, roof valley tin, shingles, celote, siding strips, corner boards and felt paper, all in so far as materials were available and all in accordance with owner's specifications.

(10) Applying asbestos shingles to house including addition, when supplied by owners.

(11) Remodeling kitchen and old stairway of house in accordance with owners directions.

(12) Placing tailings gravel for backfill, in and around the basement walls of the new location of house, all as directed by owners. [4]

B. Materials furnished and other items of expense.

6 pc. 4/81½ black celotex at \$4.00.....	\$24.00
3 windows—1 triple frame—	
1 O. S. door frame.....	52.30
Roof valley tin and bracket.....	3.50
7 concrete flue blocks at \$2.95.....	20.65
1 keg 16 D commons.....	12.00
1 keg 8 D commons.....	12.00
1 keg 6 D commons.....	12.00
Form wire .....	10.00
8 pcs. 2/12-16 ft. ....	31.00
1 bunch wood shingles.....	3.50
5 pcs. 1/4-12 ft. No. 1 fir finish.....	3.50
3 bunches siding strips.....	1.50
2 lbs. siding nails.....	.40
3 rolls 15 lb. felt.....	11.35
20 lbs. 2 D. shingle nails.....	2.40
Sand and gravel for backfill and concrete.....	261.00
Rent on Cat and concrete mixer.....	64.00
Tax on materials furnished.....	1.47

— \$ 526.08

Labor from Sept. 10 inc. Dec. 16 (exclusive), 1946	
987 hours .....	\$2,220.75
<hr/>	
Total .....	\$2,746.83
10-15-46 on account .....	1,000.00
<hr/>	
	\$1,746.83

Dated November 5, 1947.

/s/ W. M. GILLIS.

(Acknowledgment of Service.)

\_\_\_\_\_  
[Title of District Court and Cause.]

### ANSWER

Answering the Complaint of the plaintiff, the defendants admit, deny and allege:

#### I.

Answering Paragraph 1 of said Complaint, defendants admit that plaintiff is now and at all times mentioned in said Complaint, was a contractor and builder doing business at Nome, Alaska, and that the defendants are and were the owners of Lot 1, in Block L, and Lot 8 and the No. 22 ft. of Lot 7 in Block B, and the building formerly upon Lot 1, in Block L, Nome, Alaska, and that said building is now situate on Lot 8 and the No. 22 ft. of Lot 7, in Block B in said city; and except as hereinafter affirmatively alleged, deny generally all other allegations in said paragraph 1 of said Complaint.

#### II.

Answering paragraph 3 of said Complaint, defendants have no knowledge or information suffi-

cient to form a belief as to such allegations and therefore, deny the same.

### III.

Answering paragraph 4 of said Complaint, defendants admit that the plaintiff filed a purported lien in the office of the Recorder for the Cape Nome Precinct, Second Division, Alaska, on the 14th day of March, 1947, and that a purported copy of such lien is attached to said Complaint; and defendants deny generally all other allegations set forth in said paragraph 4.

### IV.

Answering paragraph 5 of said Complaint, defendants admit that they paid to the plaintiff the sum of \$1,000.00 on account of work done by him for moving the house of the defendants from Lot 1, Block L, to Lot 8 and the No. 22 ft. of Lot 7, in Block B, pursuant to the agreement hereinafter affirmatively alleged and the defendants otherwise deny generally all of the allegations in said paragraph 5 of said Complaint.

### V.

Further answering plaintiff's Complaint and by way of Cross Complaint, defendants allege that on or about the 8th day of August, 1946, plaintiff and defendants entered into an agreement wherein and whereby the plaintiff agreed to move, in a skillful and workmanlike manner, the residence of the defendants located on Lot 1, Block L, on the south side of Front Street, to Lot 8 and the No. 22 ft. of Lot 7 in Block B, in Nome, Alaska, which said lots and



residence were then and now are owned by the defendants; and under the terms of which said agreement, the plaintiff was to pour a full cement basement, in a skillful and workmanlike manner, for said residence at the place to which the same was to be moved and to build thereon, when said residence was moved, an addition of the size of 8 ft. x 30 ft. across the back and enclose a porch to be used for a dining room of the size 7 ft. x 17 ft. on the east side, and to complete the same in a skillful and workmanlike manner for occupancy. And to take the heavy timbers of the size 6" x 8" from the bulkhead on Lot 1 Block L on the south side of Front Street and use them as posts in the concrete basement, under the residence, when moved, as braces. And to have said building moved and completed as aforesaid in the month of October, 1946. And under the terms and conditions of said agreement, all materials were to be furnished by the defendants and for which the defendants promised and agreed to pay to the plaintiff the sum of \$2,872.28. [6]

## VI.

That prior to the commencement of the moving of said dwelling and at the request of the plaintiff, the defendants paid to the plaintiff upon such contract the sum of \$1,000.00.

That the plaintiff in violation of said agreement, failed, neglected and refused to move said residence to said Lot 8 and the No. 22 ft. of Lot 7 in Block B until on or about the 12th day of November, 1946, and after freezing weather.



## VIII.

In the latter part of January, 1947, the plaintiff advised the defendants that he was going to do nothing further in connection with the moving of said residence of defendants, or upon such residence, or the concrete basement thereunder. That thereafter the defendants completed said cement basement at a cost of \$327.50 which sum was a reasonable amount therefor.

## IX.

That the plaintiff left said residence unbraced by reason of which it sagged in the middle a distance of five inches and until the doors in the building would not open and the defendants were compelled to have said building raised and five bracing posts put thereunder and for which they expended the sum of \$190.00.

## X.

That the defendants had thawed and excavated a sump, in the basement of said dwelling, and expended therefor \$39.75, which said sump the plaintiff, wantonly and negligently filled in and the same became a total loss to the defendants.

## XI.

That the plaintiff in the moving of said dwelling after freezing weather had begun, negligently left the basement of said building open by reason of which the ground floor of the basement froze and plumbing was damaged, and to repair it the defendants have expended the sum of not less than \$107.89.

## XII.

That in the moving of said residence, the plaintiff carelessly and negligently failed to sufficiently brace a concrete block chimney, so that it was practically ruined and to repair it the defendants have paid the sum of \$100.00.

## XIII.

That the plaintiff failed, neglected and refused to complete the addition to said residence to be used for a dining room and defendants were compelled to complete the same at a cost of \$260.00.

## XIV.

That the plaintiff removed and took away from said premises one Burks pressure pump, which has never been returned to the defendants, of the value of \$150.00.

## XV.

That in the moving of said residence, the plaintiff cut off one corner of said residence and failed, neglected and refused to repair the same, and the cost of such repair will be at least \$100.00.

## XVI.

That in the pouring of the walls of said cement basement the plaintiff negligently poured the same without proper foundation by reason of which the walls of said basement cracked in diverse places and the water now seeps through the walls into the basement, by reason of which the defendants have been damaged in the sum of \$500.00. [7]

## XVII.

That by reason of the plaintiff failing to move said building and have the same ready for occup-

ancy as provided for in said agreement, the defendants were unable to move into said residence before the 15th day of February, 1947, and were compelled to expend for room rent during such period that they were kept from the occupancy of such residence, in the sum of \$410.00; and were compelled to board at the restaurants during such period and for such board they expended the sum of \$412.00.

### XVIII.

That by reason of the breach of said contract by the plaintiff and his failure to move said dwelling and have the same ready for occupancy as provided for in said agreement, the defendants have been damaged in the sums and amounts as herebefore stated and in the total sum of \$2,597.14.

Wherefore the defendants pray judgment against the plaintiff for the sum of \$724.86; and for the costs and disbursements herein incurred, including a reasonable attorney's fee.

/s/ O. D. COCHRAN,

Attorney for Defendants.

(Duly Verified.)

[Endorsed]: Filed Nov. 26, 1947.

[8]

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[Title of District Court and Cause.]

### REPLY

In reply to defendants answer filed herein, plaintiff admits, denies and alleges as follows:

## 1.

Replying to paragraph V of said answer, plaintiff admits and alleges that on or about the 8th day of August, 1946, he was approached by defendants in reference to furnishing the work and labor necessary to do the jobs for defendants as outlined in said paragraph V, and that at the time defendants stated that all materials would be furnished by them: That plaintiff then and there informed defendants that he was tied up doing contract work and that in the event he undertook the work for defendants, their work would have to be wedged in between these contract jobs. Plaintiff also admits, that at the request of defendants he furnished them with an estimated labor cost bill which was in the amount of \$2,872.28; that defendants stated they considered the estimate of labor too high, but later notified plaintiff to go ahead and do the work.

Except as admitted herein, plaintiff denies every allegation in said paragraph V contained.

## 2.

Replying to paragraph VI of defendants answer, plaintiff acknowledges receipt from defendants of \$1,000.00 paid on account of work being then performed under defendants' "go ahead" order set forth in paragraph 1 herein just above, but that said sum was less than the amount or sum then due plaintiff for the work he had already performed for them.

Except as herein admitted, plaintiff denies all allegations in said paragraph VI contained.

## 3.

Replying to paragraphs VIII of defendants' answer, plaintiff admits telling defendant Ben F. Gillette that he would do no more work for defendants but that the statement was made after defendant Irene Gillette had ordered plaintiff to discontinue the work as affirmatively alleged hereinafter.

Due to lack of information, plaintiff denies all other allegations in said paragraphs VIII contained.

## 4.

Replying to paragraph IX of defendants' answer, plaintiff, because of lack of information, denies all allegations therein contained; and alleges that if any sagging took place as alleged, it took place after work had been stopped by defendant Irene Gillette, and was not the fault of plaintiff.

## 5.

Replying to paragraph X of defendants' answer, because of lack of information, plaintiff denies all allegations therein contained; and alleges that if a sump was filled in as alleged, it was filled in by reason of back-fill placed at the direction of defendants and without acknowledge on the part of plaintiff of any such sump. [9]

## 6.

Replying to paragraph XI of defendants' answer, plaintiff because of lack of information, denies all allegations therein contained; and alleges that plaintiff had nothing whatsoever to do with the plumbing of defendants' residence either before or after it was moved.

7.

Replying to paragraph XII of defendants' answer, plaintiff denies all allegations therein contained.

8.

Replying to paragraph XIII of defendants' answer, plaintiff, because of lack of information, denies all allegations therein contained; and alleges that prior to the time work was stopped by defendant Irene Gillette, materials were not available for the completion of the dining room as alleged.

9.

Replying to paragraph XIV of defendants' answer, plaintiff denies all allegations therein contained.

10.

Replying to paragraph XV of defendants' answer, plaintiff admits cutting off a corner of the cornice of the residence building in order to get the building in place and that he did not repair the same, but alleges that the cornice was cut off with the knowledge, consent and approval of defendants, and that the same was not repaired due to the fact that defendant Irene Gillette, stopped the work before the repairs could be made.

Plaintiff, due to lack of information, denies all other allegations in said paragraph XV contained.

11.

Replying to paragraph XVI of defendants' answer, plaintiff, due to lack of information denies all allegations therein contained, and alleges that defendants prepared the foundation for the pour-



ing of the cement walls and that the pouring was done in accordance with directions of defendants.

12.

Replying to paragraph XVII of defendants' answer, plaintiff, due to lack of information, denies all allegations therein contained, and alleges that any expenditures made by defendants as alleged, was not the result of breach of contract on the part of plaintiff.

13.

Replying to paragraph XVIII of defendants' answer, plaintiff denies all allegations therein contained.

For further reply to defendants' answer plaintiff alleges:

A.

That although defendants originally agreed that they would furnish all materials necessary to complete the jobs as alleged and for which plaintiff was hired to furnish the labor, from time to time as the work progressed, materials were needed which defendants did not have available, and at such times defendants authorized plaintiff to supply such materials. This plaintiff did as to the materials which he could obtain, and as shown in detail in the "Detailed Statement of Account" filed by plaintiff in this cause. [10]

B.

That on or about the 15th day of December, 1946, in front of the North Pole Bakery, Nome, Alaska, in the presence of plaintiff and another person, defendant Irene Gillette, in response to

an inquiry from plaintiff as to whether or not defendants had obtained certain needed materials for defendants' work at hand, defendant Irene Gillette replied, "No we haven't, and you can just let the whole thing go." That immediately thereafter, because of this order, plaintiff took his workmen from defendants' job and removed his tools.

That sometime after this order by Irene Gillette, and after plaintiff had removed his workmen and tools from defendants' work, defendant Ben F. Gillette made inquiry of as to when he would return and complete defendants' work. That Ben F. Gillette was then and there informed by plaintiff that he had been ordered off the work by Irene Gillette and that he was not returning to do any more work for defendants.

Wherefore, having replied to defendants' answer, plaintiff prays for judgment and decree in accordance with the prayer of his complaint.

/s/ C. C. TANNER,  
Attorney for Plaintiff.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 11, 1947.

[11]

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on the 26th day of December, 1947, before this court without a jury,



C. C. Tanner appearing for the plaintiff and O. D. Cochran appearing for the defendants, and evidence of both parties having been heard, the court reserved decision until the 29th day of March, 1948, at which time a memorandum of Findings and Conclusions was served upon both parties, counsel for defendants having died before such decision was made, and the attorney for plaintiff having since refused to make or file Findings of Fact, Conclusions of Law or Judgment herein, the Court being fully advised in the premises, now makes the following:

## FINDINGS OF FACT

### I.

That plaintiff is now and was at all times hereinafter mentioned, a contractor and builder, doing business at Nome, Alaska.

### II.

That defendants are now and were at all times hereinafter mentioned the owners of Lot 8, and the North 22 feet of Lot 7, Block 5, Nome, Alaska, and the owners of the dwelling house thereon. [12]

### III.

That on or about August 8, 1946, plaintiff undertook to pour a full concrete basement on the land described in paragraph two hereof and to move defendants' dwelling house from its then location on the south side of Front Street in Nome, Alaska, to the land described in paragraph two hereof. That said basement and the moving operations

were to be completed in October, 1946, at a cost of Two Thousand Eight Hundred Seventy-two and 28/100 (\$2,872.28) Dollars. That all materials were to be furnished by the defendants. That defendants paid plaintiff on account the sum of One Thousand (\$1,000.00) Dollars on October 10, 1946. That plaintiff did not complete the moving of the house in the month of October, 1946, but continued to work thereon from time to time until December 15, 1946, at which time he abandoned the work.

#### IV.

That on March 14, 1947, plaintiff filed his claim of lien for the sum of Two Thousand Seven Hundred Forty-six and 83/100 (\$2,746.83) Dollars, in which he gave credit to the defendants for One Thousand (\$1,000.00) Dollars advanced, his claim of lien being thereby reduced to One Thousand Seven Hundred Forty-six and 83/100 (\$1,746.83) Dollars; that said claim of lien was filed in the office of the recorder of the Cape Nome Precinct, Second Division, Territory of Alaska.

#### V.

That after the abandonment by the plaintiff of the work on defendants' house, the defendants completed the full concrete basement which plaintiff had failed to complete at a cost to them in the sum of Three Hundred Twenty-seven and 50/100 (\$327.50) Dollars. [13]

#### VI.

That the plaintiff left the dwelling house of the defendants unbraced by reason of which it sagged

in the middle a distance of five inches and until the doors in the building would not open and the defendants were compelled to have said building raised and five bracing posts put thereunder and for which they expended the sum of One Hundred Ninety (\$190.00) Dollars.

#### VII.

That the defendants had thawed and excavated a sump, in the basement of said dwelling, and expended therefor the sum of Thirty-nine and 75/100 (\$39.75) Dollars, which said sump the plaintiff wantonly and negligently filled in and the same became a total loss to the defendants.

#### VIII.

That the plaintiff is not shown to be responsible for any damage to the concrete block chimney, for which defendants claim One Hundred (\$100.00) Dollars.

#### IX.

That the plaintiff is shown to be responsible for failure to complete the addition to said dwelling house to be used as a dining room, for which defendants claim Two Hundred Sixty (\$260.00) Dollars.

#### X.

That the plaintiff is not shown to be responsible for the removal of the Burks Pressure Pump for which defendants claim One Hundred Fifty (\$150.00) Dollars.

#### XI.

That plaintiff is not shown to be responsible for having left the basement of the dwelling open, or

for damage [14] by frost to the basement floor and the plumbing, for which defendants claim One Hundred Seven and 89/100 (\$107.89) Dollars.

## XII.

The plaintiff is not shown to be responsible for the cutting off one corner of the dwelling house, for which defendants claim One Hundred (\$100.00) Dollars.

## XIII.

That plaintiff is not shown to be responsible for negligently pouring the concrete basement walls without proper foundation, for which defendants claim the sum of Five Hundred (\$500.00) Dollars.

## XIV.

That plaintiff is not shown to be responsible for defendants' room rent, as alleged and claimed in paragraph XVII of the defendants' answer at Four Hundred Ten (\$410.00) Dollars, and defendants' board as alleged therein at Four Hundred Twelve (\$412.00) Dollars.

## XV.

That in the moving operations of the plaintiff, he furnished materials at the request of the defendants to the value of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

And from the foregoing Findings of Fact, the Court concludes:

## CONCLUSIONS OF LAW

### I.

That plaintiff is entitled to judgment against defendants for materials furnished by him at the

instance [15] of the defendants in the sum of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

## II.

That defendants are entitled to judgment against the plaintiff in the sum of Eight Hundred Seventeen and 25/100 (\$817.25) Dollars.

## III.

That no attorneys' fees or costs be allowed either party.

## IV.

That on settlement, the lien filed by plaintiff be discharged.

Dated at Nome, Alaska, this 27th day of August, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Aug. 27, 1948.

[16]

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In the District Court for the Territory of Alaska,  
Second Division.

No. 3737—Civil

W. M. GILLIS,

Plaintiff,

vs.

BEN F. GILLETTE and IRENE GILLETTE,  
Defendants.

## JUDGMENT

This cause having come on for trial on the 26th day of December, 1947, before the Court, without

a jury, C. C. Tanner appearing for the plaintiff and O. D. Cochran appearing for the defendants, and the Court having heard testimony of both plaintiff and defendants, and the arguments of counsel, and having reserved decision until the 29th day of March, 1948, at which time a memorandum of the Court's decision was served upon both parties, counsel for the defendants having died before such decision was made, and the attorney for plaintiff having since refused to make or file Findings of Fact, Conclusions of Law or Judgment herein, and the Court having now made and filed Findings of Fact and Conclusions of Law herein, and being fully advised in the premises, does now adjudge:

1. That the plaintiff is entitled to judgment against defendants for materials furnished by him at the instance of the defendants in the sum of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

2. That defendants are entitled to judgment against the plaintiff in the sum of Eight Hundred Seventeen and 25/100 (\$817.25) Dollars.

3. That no attorneys' fees or costs be allowed either party. [17]

4. That on settlement, the lien filed by plaintiff be discharged.

Dated at Nome, Alaska, this 27th day of August, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Aug. 27, 1948.

[18]



[Title of District Court and Cause.]

## PETITION FOR ALLOWANCE OF APPEAL

The above-named Plaintiff, W. M. Gillis, considering himself aggrieved by the Final Judgment of this Court made and entered in the above-entitled action on the 27th day of August, 1948, in favor of the Defendants and against the Plaintiff, for the sum of \$291.17, does hereby appeal from said Judgment to the United States Circuit Court of Appeals for the Ninth Circuit: said Appeal being taken to the extent and for the reasons set forth in the Assignment of Errors, which is filed herewith,

Wherefore, Plaintiff prays that this Appeal be allowed: that a Citation issue to the Defendants in accordance with law: and that a Transcript of the record, proceedings and papers upon which the aforesaid Judgment was made be certified to and sent to the Appellate Court:

The Plaintiff Further Prays that the Court fix the amount of cost bond required of Plaintiff on Appeal.

Dated the 20th day of October, 1948.

C. C. TANNER,  
Attorney for Plaintiff,

W. M. Gillis.

[Endorsed]: Filed Oct. 20, 1948.

[19]

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

Comes Now W. M. Gillis, Plaintiff herein, and alleges that the Final Judgment made and entered in the above-entitled cause on the 27th day of August, 1948, is erroneous and unjust to him and is not in conformity with the Findings of Fact filed in said cause: and, in support of the foregoing allegations, he now sets forth the Assignment of Errors upon which he will rely on Appeal.

#### 1.

For the purpose of this Appeal the Plaintiff accepts as true the Court's Findings of Fact and contends that the Court's Conclusion of Law and Judgment are not consistent with such findings as hereinafter set forth:

#### 2.

The Court erred in not concluding as a matter of law that under the contract of labor between Plaintiff and Defendants, that Plaintiff was entitled to judgment for the contract cost of labor (\$2,872.28), minus the sum of \$1,000.00 paid on account, and the damages found owing to Defendants in the total sum of \$817.25. [20]

#### 3.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for a reasonable attorney's fee designated by the Court.

#### 4.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for the sum of \$1.95, the cost of filing his lien.



## 5.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to judgment for costs.

## 6.

The Court erred in not concluding as a matter of law that Plaintiff was entitled to a judgment of foreclosure against Defendants' property described as Lot Eight (L. 8) and the North twenty-two feet (No. 22') of Lot Seven (L. 7), Block "B" (Bl. B), Nome, Alaska, for his unpaid labor bill in the sum of \$1,055.03, plus costs of materials furnished in the sum of \$526.08, plus a designated, reasonable attorney's fee, plus the lien filing fee of \$1.95, plus costs.

## 7.

The Court erred in not finding as a matter of law that Plaintiff was entitled to judgment for interest at the rate of 6% per annum on the sum of \$1,581.11 (labor bill of \$1,055.03, plus costs of materials furnished \$526.08) from the 16th day of December, 1946, until paid.

## 8.

The Court erred in not giving and entering judgment in favor of Plaintiff for labor performed in the sum of \$1,055.03; said sum being the difference between the contract price (\$2,872.28), minus the sum paid Plaintiff on account (\$1,000.00) and the damages allowed Defendants (\$817.25). [21]

## 9.

The Court erred in not giving and entering judgment in favor of Plaintiff for a designated, reasonable attorney's fee.

10.

The Court erred in not giving and entering judgment in favor of Plaintiff for his lien filing fee of \$1.95.

11.

The Court erred in not giving and entering judgment in favor of Plaintiff for his costs.

12.

The Court erred in not giving and entering judgment of lien foreclosure against Defendants' premises described as Lot Eight (L. 8) and the North twenty-two feet (No. 22') of Lot Seven (L. 7), Block "B" (Bl. B), Nome, Alaska, for the sum of \$1,581.11, plus the lien filing fee of \$1.95, plus a designated, reasonable attorney's fee, plus Plaintiff's costs.

13.

The Court erred in not giving and entering judgment in favor of Plaintiff for interest at the rate of 6% per annum on the sum of \$1,581.11 from the 16th day of December, 1946, until paid.

Wherefore, Plaintiff prays that said Judgment be reversed, revised, corrected and amended, all in accordance with the foregoing Assignment of Errors, and that the Plaintiff receive Judgment for that which is justly due him.

Dated this 20th day of October, 1948.

/s/ C. C. TANNER,

Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 20, 1948.

[22]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING  
AMOUNT OF COST BOND

This day came Plaintiff, W. M. Gillis, by his attorney, C. C. Tanner, and filed and presented his Petition for Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and his Assignment of Errors, and upon consideration thereof

It Is Now Ordered that said Appeal be, and the same is hereby allowed; and that the Plaintiff shall execute a bond for costs on appeal according to law in the sum which is hereby fixed at \$250.00:

It Is Further Ordered that a Citation issue to the Defendants in accordance with law:

It Is Further Ordered that a transcript of the record, proceedings and papers upon which Judgment in this cause was made be certified to and sent to the Appellate Court aforesaid.

Dated at Nome, Alaska, this 20th day of October, 1948.

/s/ JOSEPH W. KEHOE,  
Judge of the District Court, for the Territory of  
Alaska, Second Division.

Presented by:

/s/ C. C. TANNER,  
Attorney for Plaintiff and Appellant.

[Endorsed]: Filed Oct. 20, 1948.

[23]

[Title of District Court and Cause.]

**COST BOND ON APPEAL**

Know All Men By These Presents:

That we, W. M. Gillis, as principal, Joseph Wallace of Nome, Alaska, and Axel Edman of Nome, Alaska, as sureties, are hereby held and firmly bound unto Ben F. Gillette and Irene Gillette, above-named Defendants, in the sum of \$250, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of October, 1948.

The condition of the above obligation is such that:

Whereas, the above-named, bounden Plaintiff has filed his Petition of Appeal and is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Final Judgment made and entered by the Judge of the above-entitled Court, on the 27th day of August, 1948, [24] wherein the above-named Defendants were given Judgment against the above-named Plaintiff for the sum of \$291.17, and

Whereas, said Plaintiff is appealing from said Judgment to the extent and in accordance with his Assignment of Errors filed herein on appeal, to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse, revise, correct and amend said Judgment,

Now Therefore, if the Plaintiff, above-named, shall prosecute said appeal to effect and answer

all costs that may be adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ W. M. GILLIS,  
Principal.

/s/ JOSEPH WALLACE,  
Surety.

/s/ AXEL EDMAN,  
Surety.

United States of America,  
Territory of Alaska—ss.

Joseph Wallace and Axel Edman being first duly sworn, each for himself, says:

I am one of the sureties who executed the foregoing Bond on Appeal. I am a resident of Nome, Alaska. I am not a counselor or attorney at law, Marshal, Deputy Marshal, Commissioner, Clerk of any Court or other officer of any Court. I am worth the sum of \$500.00 over and above all my just debts and liabilities and exclusive of property exempt from execution.

/s/ JOSEPH WALLACE,  
/s/ AXEL EDMAN.

Subscribed and Sworn to before me this 28th day of October, 1948.

(Seal) /s/ C. D. ANDERSON,  
Notary Public in and for the Territory of Alaska,  
Residing at Nome. My Commission expires Oct.  
27, 1951.

The foregoing Bond is approved this 4th day of October, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

[Endorsed]: Filed Nov. 5, 1948.

[25]

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[Title of District Court and Cause.]

STIPULATION RE: PRINTING OF RECORD

It is hereby stipulated, by and between the above-named parties, that in printing the papers and records to be used on the hearing on Appeal in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and Cause in full and on all papers shall be omitted, except on the first page of said record and that there shall be inserted in place of said title on all papers used as a part of said records the words "Title of Court and Cause". Also, that all endorsements on said papers used as a part of said record may be omitted, except as to the Clerk's file marks and the admission of service.

Dated this 6th day of December, 1948.

W. M. GILLIS,  
By /s/ C. C. TANNER,  
His Attorney.

/s/ IRENE A. GILLETTE,  
/s/ BEN F. GLLETTE,  
Defendants.

[Endorsed]: Filed Dec. 23, 1948.

[26]



[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING  
TRANSCRIPT ON APPEAL

A Motion, supported by Affidavit, having on the 2nd day of December, 1948, been duly presented to the Court by W. M. Gillis, Plaintiff and Appellant herein, praying for an extension of time within which the Clerk of this Court may file Transcript on Appeal with the United States Circuit Court of Appeals at San Francisco, California, and the Court considering the Motion well taken,

It Is Now Ordered that the time for the filing of such Transcript be, and the same is hereby extended, up to and including the 17th day of January, 1949.

Dated this 2nd day of December, 1948.

/s/ JOSEPH W. KEHOE,  
United States District Judge.

[Endorsed]: Filed Dec. 2, 1948.

[27]

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[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To: Norvin W. Lewis, Clerk of the above-entitled Court.

W. M. Gillis, Plaintiff and Appellant herein, hereby requests that you prepare transcript of record on Appeal in the above-entitled cause and file the transcript in the office of the Clerk of the United



States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California:

A designation of the records and papers to be included in such transcript follows:

1. Complaint.
2. Plaintiff's "Detailed Statement of Account".
3. Answer.
4. Reply.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Petition for Appeal.
8. Assignment of Errors.
9. Order Allowing Appeal and Fixing Cost Bond.
10. Cost Bond on Appeal.
11. Citation.
12. Stipulation on Printing of Record.
13. Praecipe.
14. Also, included in this transcript, any Order this Court may hereinafter make extending the time for filing the transcript. [28]

Please prepare this transcript as required by law and the rules and orders of this Court and the Circuit Court of Appeals for the Ninth Circuit, and forward same to the said Appellate Court at San Francisco, California, so that it may be docketed therein on, or before, the 13th day of December, 1948.

Dated this 8th day of November, 1948.

/s/ C. C. TANNER,

Attorney for Plaintiff and Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 23, 1948.

[29]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Territory of Alaska, Second Division—ss.

I, Norvin W. Lewis, Clerk of the District Court of the Territory of Alaska, Second Division, do hereby certify that the foregoing transcript on Appeal consisting of typewritten pages, from 1 to 29 both inclusive, is a true and exact transcript of the Complaint, Plaintiff's "Detailed Statement of Account", Answer, Reply, Findings of Fact and Conclusions of Law, Judgment, Petition for Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Cost Bond, Cost Bond on Appeal, Stipulation on Printing of Record, Order Enlarging Time to File Transcript and Praecept in the case of *W. M. (alias Bill) Gillis, Plaintiff vs. Ben F. Gillette and Irene Gillette, Defendants*, No. 3737 this Court and of the whole thereof, as appears from the Records and Files in my Office at Nome, Alaska, and I further certify that the Original Citation on Appeal is annexed to this Transcript.

Cost of Transcript \$12.40 paid by C. C. Tanner, Attorney for Plaintiff, *W. M. Gillis*.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 31st day of December, 1948.

(Seal)            /s/ NORVIN W. LEWIS,  
Clerk.

[Title of District Court and Cause.]

CITATION ON APPEAL

To: The Defendants above-named, Ben F. Gillette and Irene Gillette, and to their attorney, whoever he may be,

Greetings:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within forty (40) days from the date of this Writ, pursuant to an Appeal filed in the Clerk's Office of the District Court of the Territory of Alaska, Second Division, wherein W. M. Gillis is Plaintiff and Appellant, and Ben F. Gillette and Irene Gillette are Defendants and Appellees, to show cause, if any there be, why the Final Judgment made and entered in said cause on the 27th day of August, 1948, should not be reversed, revised, corrected and amended in accordance with Appellant's Assignment of Errors filed on Appeal herein.

In Witness Whereof, I, Joseph W. Kehoe, Judge of the District Court, for the Territory of Alaska, Second Division, have hereunto set my hand the 4th day of November, 1948.

/s/ JOSEPH W. KEHOE,  
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 23, 1948.

[Endorsed]: No. 12145. United States Court of Appeals for the Ninth Circuit. W. M. (alias, Bill) Gillis, Appellant, vs. Ben F. Gillette and Irene Gillette, Appellees. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Second Division.

Filed January 4, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.





In the United States Court of Appeals for  
the Ninth Circuit

No. 12,145

W. M. (ALIAS, BILL) GILLIS,

Appellant,

vs.

BEN F. GILLETTE and IRENE GILLETTE,

Appellees.

Appeal from the District Court for the Territory of  
Alaska, Second Division

Oct. 4, 1949

### OPINION

Before: Healy, Bone and Orr,  
Circuit Judges.

Bone, Circuit Judge.

Appellant, Gillis, brought this action in the District Court for the Territory of Alaska to recover from appellees, Gillette and wife, judgment in the sum of \$1,746.83 plus interest, costs and attorney's fee, and to enforce said judgment by foreclosure of a labor and material lien which had theretofore been filed against appellees' real property. The \$1,746.83 was alleged to represent the difference between the reasonable value (\$2,746.83) of labor and materials furnished by Gillis in moving, altering and repairing a house owned by the Gillettes, and a \$1,000.00 payment theretofore made by appellees.

Appellees' answer admitted that a purported lien



had been filed by appellant and that appellees had paid the \$1,000.00 to appellant, and denied other allegations in the complaint. By way of cross-complaint appellees alleged that the parties had entered into an agreement whereby appellant was to move, alter and repair appellees' house for the sum of \$2,872.28, the work to be completed in October, 1946. Appellant was to furnish the labor and appellees to provide the materials. They further alleged that the house was not moved until November 12, 1946, (after freezing weather) and that certain alterations and repairs were not completed by appellant; that by reason of appellant's delay, failure to complete the work, and negligent performance of work done appellees had sustained damages in the total sum of \$2,597.14, whereupon they prayed for judgment in the sum of \$724.86. (This latter amount clearly represents the difference between the alleged damages [\$2,597.14] and the unpaid amount of the contract price [\$1,872.28].)

The court made Findings of Fact and Conclusions of Law and entered judgment thereon. The material Findings, briefly stated, were that the parties had entered into an agreement as alleged in appellees' answer, that appellant had abandoned the work before completion, that as the result of appellant's breaches appellees had sustained various items of damage in the total sum of \$817.25 (most of which represented the cost of completing the work), and that appellant had furnished, at the request of appellees, materials to the value of \$526.08.

The court's Conclusions of Law were that appel-

lant was entitled to judgment in the sum of \$526.08 (the value of materials furnished by him; no recovery for labor was allowed), that appellees were entitled to judgment on their cross-complaint in the sum of \$817.25, that neither party was entitled to attorney's fee or costs, and that "on settlement," the lien filed by appellant would be discharged. Judgment was entered in accordance with these conclusions.

Appellant contends that the Conclusions of Law are inconsistent with, and not supported by, the Findings of Fact entered by the court. We agree with this contention.

One of the issues of this case as disclosed by the pleadings concerns whether or not appellant's abandonment was willful or whether it was done in compliance with appellees' request. In his reply appellant asserted that he had stopped work because ordered so to do by Mrs. Gillette. The trial court should have made a finding on this issue.

In other respects the Findings appear to be inconsistent. The court found that under the terms of the agreement all of the materials were to be furnished by appellees. In another finding it found that appellant had furnished materials at the request of appellees to the value of \$526.08, and judgment for this amount was entered for appellant. Since these materials were furnished "in the moving operations," they may have been furnished as the result of and in compliance with a modification of the original agreement. The trial court should make a finding concerning the question of whether these

materials were furnished in compliance with a modification of the original agreement or in compliance with a new and separate agreement.

If the court finds that the materials were furnished by appellant under a separate agreement (to furnish materials) then the court should further find whether or not the claim of lien for these materials was filed within the proper period of time after appellant ceased to furnish the materials.

Without additional findings of the character above indicated, we are unable to determine the validity of the Conclusions of Law and the Judgment. The case is therefore remanded to the trial court with directions to enter such further Findings with leave to amend the Conclusions of Law and Judgment to conform to the Findings.

[Endorsed]: Opinion. Filed Oct. 4, 1949. Paul P. O'Brien, Clerk.

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In the District Court for the Territory of Alaska  
Second Division

No. 3737 Civil

W. M. GILLIS,

Plaintiff,

vs.

BEN F. & IRENE GILLETTE,

Defendants.

FINDINGS OF FACTS AND CONCLUSIONS  
OF LAW

This cause came on for trial on the 26th day of December, 1947, before the Court sitting without a

jury, C. C. Tanner appearing as attorney for the plaintiff and O. D. Cochran appearing as attorney for the defendants; and evidence of both parties having been heard, the Court reserved decision until August 27, 1948, at which time Findings of Fact and Conclusions of Law and Judgment were entered and served on both parties; and thereafter an appeal was taken by the plaintiff to the United States Court of Appeals for the Ninth Circuit, which Court of Appeals, on the 14th day of October, 1949, rendered its opinion upon said appeal, by which it remanded said cause to this Court with directions to enter further Findings in accordance with its said opinion, with leave to this Court to amend its Conclusions of Law and Judgment to conform to the Findings, that opinion having been filed herein on the 9th day of November, 1949, the Court being fully advised in the premises, and having reconsidered the pleadings and evidence in said cause in light of the said opinion of the said Court of Appeals, now makes the following:

### Findings of Fact

#### I.

That plaintiff is now and was at all the times hereinafter mentioned a contractor and builder, doing business at Nome, Alaska.

#### II.

That defendants are now and were at all times hereinafter mentioned the owners of Lot 8 and the

North 22 feet of Lot 7, Block 5, Nome, Alaska, and the owners of the dwelling house thereon.

### III.

That on August 8, 1946, plaintiff undertook to pour a full concrete basement on the land described in paragraph II hereof, to move defendants' dwelling house from its then location on the South side of Front Street in Nome, Alaska, across the street to the land described in paragraph II hereof, and to construct an addition to said dwelling house, as shown and directed by the defendants; that by the terms of the agreement, the dwelling house was to be moved in October, 1946. That the moving operations, the pouring of the full concrete basement at the new site of the dwelling house and the construction of the addition thereto were to cost the defendants the sum of Two Thousand Eight Hundred Seventy-two and 28/100 (\$2872.28) Dollars. That on October 10, 1946, defendants paid to plaintiff the sum of One Thousand (\$1000.00) Dollars to apply upon the total cost. That plaintiff did not move the dwelling house during the month of October, 1946, and not until freezing weather had set in, approximately November 12, 1946; that plaintiff continued to work on said dwelling from time to time until December 15, 1946, at which time he abandoned the work, leaving it unfinished in the following particulars:

(1) Plaintiff failed to complete the full concrete basement.

(2) Plaintiff left the house unbraced so that it



sagged in the center (5) five inches, so that doors on the main floor would not open.

(3) Plaintiff failed to replace the cornice cut from the dwelling in the moving operations.

(4) Plaintiff negligently filled in and covered the sump in the excavation for the basement of the dwelling.

(5) Plaintiff failed to complete the addition to the dwelling to be used as a dining room.

That plaintiff's abandonment of the work was willful and without cause.

#### IV.

That during the moving and building operations, the plaintiff, with the consent of the defendants, and as a separate agreement from that in which the defendants were to furnish all materials to be used therein, supplied certain extra services and supplies of the value of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars; that these services and supplies were actually furnished by the defendants, the plaintiff only acting as agent for them in the purchase thereof. That defendants got the benefit for said services and supplies, and that plaintiff paid therefore the full sum of Five Hundred Twenty-six and 08/100 (\$526.08) Dollars.

That all of said services and supplies were furnished between the 12th day of November, 1946, and the 15th day of December, 1946, and the last of said supplies was furnished sometime prior to the 15th day of December, 1946, and more than ninety days prior to the filing of the purported lien herein. That all materials furnished by plaintiff for use in

said dwelling house were purchased in Nome, Alaska, the residence of both plaintiff and defendants, as shown by plaintiff's Exhibits "C", "D" and "E", and might have been purchased and furnished by defendants, and were charged by plaintiff to defendants at retail prices, by express admission of plaintiff. That the sum charged by plaintiff was, and is a charge of the reasonable value thereof.

#### V.

That in the latter part of January, 1947, plaintiff informed defendants that he was going to do nothing further upon the dwelling house of defendants or the concrete basement thereof; that he then quit and withdrew from the premises. That thereafter the defendants completed said concrete basement at a cost of Three Hundred Twenty-seven and 50/100 (\$327.50) Dollars, which sum was a reasonable amount therefor.

#### VI.

That plaintiff left said dwelling house unbraced so that it sagged five (5) inches in the center, so that doors on the main floor would not open and defendants were compelled to have said building raised and five bracing posts put thereunder, and for which they expended the sum of One Hundred Ninety and no/100 (\$190.00) Dollars.

#### VII.

That defendants had thawed and excavated a sump in the basement of said dwelling and expended



therefor the sum of Thirty-nine and 75/100 (\$39.75) Dollars, which said sump the plaintiff wantonly and negligently filled in and the same became a total loss to the defendants.

### VIII.

That plaintiff failed, neglected and refused to complete the addition to said dwelling house to be used as a dining room and defendants were compelled to complete the same at a cost of Two Hundred Sixty and no/100 (\$260.00) Dollars.

### IX.

That in the moving of the said dwelling house, the plaintiff cut off one corner of the same and failed, neglected and refused to repair the same, and the reasonable cost of the repair thereof will be the sum of One Hundred and no/100 (\$100.00) Dollars.

### X.

That the Burks pressure pump for which defendants claim One Hundred Fifty and no/100 (\$150.00) Dollars was not removed from the defendants' dwelling house or property by the plaintiff.

### XI.

That plaintiff is not shown to be responsible for having left the basement open, or for any damage by frost to the basement floor and the plumbing for which defendants claim One Hundred Seven and 89/100 (\$107.89) Dollars.

### XII.

That plaintiff is not shown to be responsible for

negligently pouring the concrete basement walls without proper foundation, for which defendants claim the sum of Five Hundred and no/100 (\$500.00) Dollars.

### XIII.

That plaintiff is not shown to be responsible for defendants' room rent during the moving operations, for which defendants claim Four Hundred Twelve and no/100 (\$412.00) Dollars.

And from the foregoing Findings of Fact, the Court deduces the following:

### Conclusions of Law

#### I.

That plaintiff is not entitled to judgment of foreclosure of the lien for labor furnished and for materials supplied in the moving, repair and building operations on the dwelling house of the defendants filed by the plaintiff on March 14, 1947, and the same should be discharged and cancelled of record.

#### II.

That plaintiff is entitled to judgment for the value of materials supplied by him and described as follows:

6 pc. 4/8-1/2 Black Celotex @ \$4.00 .....	\$ 24.00
3 windows — 1 triple window frame — one	
O.S. Door Frame .....	52.30
Roof valley tin and bracket .....	3.50
7 Concrete flue blocks @ \$2.95 .....	20.65

1 keg 16 D commons .....	12.00
1 keg 8 D commons .....	12.00
1 keg 6 D commons .....	12.00
Form wire .....	10.00
8 pcs. 2/12-16 ft. ....	31.01
1 bunch Wood shingles .....	3.50
5 pcs. 1/4-12 ft. #1 fir finish .....	3.00
3 bunches Siding strips .....	1.50
2# Siding nails .....	.40
3 rolls 15# Felt .....	11.35
20# 3 D. Shingle nails .....	2.40
Sand and Gravel for backfill & concrete ...	261.00
Rent on cat and concrete mixer .....	64.00
Tax on materials furnished .....	1.47
	<hr/>
	\$526.08

### III.

That defendants are entitled to judgment for damages suffered by them by reason of the wrongful failure of the plaintiff to complete the moving of the defendant's dwelling house within the month of October, 1946, and by reason of his willful abandonment of the work of moving, repair and building operations on said dwelling house in the following particulars:

- (1) For failure to complete the full concrete basement ..... \$327.50
- (2) For leaving the house unbraced so that it sagged in the center five (5) inches, so that the doors would not open ..... 190.00

- |  |  |          |
|--|--|----------|
| (3)  | For wantonly and negligently filling in the sump in the basement of defendants' dwelling .....                   | 39.75    |
| (4)  | For willfully failing to complete the addition to the defendants' dwelling house, to be used as a dining room .. | 260.00   |
| (5)  | For wantonly cutting off a corner of defendants' dwelling house and willfully failing to replace the same .....  | 100.00   |
| That the total sum to which the defendants are entitled is ..... |  | \$917.25 |

## IV.

That no attorney's fees or costs be allowed either party.

Dated this 2nd day of December, 1949.

/s/ JOSEPH W. KEHOE,  
U. S. District Judge.

[Endorsed]: Filed December 2, 1949.

In the District Court for the Territory of Alaska,  
Second Division

No. 3737-Civil

W. M. GILLIS,

Plaintiff,

vs.

BEN F. & IRENE GILLETTE,

Defendants.

### JUDGMENT

This cause having come on for trial on the 26th day of December, 1947, before the Court without a jury, C. C. Tanner appearing as attorney for the plaintiff and O. D. Cochran appearing as attorney for the defendants, and the Court having heard testimony of both plaintiff and defendants, and the arguments of counsel, having reserved decision until March 29, 1948, at which time a memorandum of the Court's decision was served upon both parties, counsel for the defendants having died before such decision was made, and defendants not being represented by an attorney; and attorney for plaintiff having since refused to make and file Findings of Fact, Conclusions of Law or Judgment herein, and the Court having made Findings of Fact, Conclusions of Law and Judgment, from which Findings, Conclusions and Judgment plaintiff appealed to the United States Court of Appeals for the Ninth Circuit; and thereafter on the 14th day of October, 1949, said United States Court of Appeals rendered

its opinion upon said appeal, remanding said cause to this Court with directions to enter further Findings in accordance with its opinion, with leave to this Court to amend its Conclusions of Law and Judgment to conform to the Findings so made, that opinion having been filed herein on the 9th day of November, 1949, the Court having reconsidered the pleadings and evidence in said cause in the light of the said Opinion of said Court of Appeals, both plaintiff and defendants having been afforded the opportunity to submit Findings, Conclusions and Judgment herein, and neither party having done so, the Court being fully advised in the premises, and having filed its Findings and Conclusions herein,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the lien heretofore filed by the plaintiff upon Lot Eight (8) and the North 22 feet of Lot Seven (7), Block 5, Nome, Alaska, and the dwelling house thereon, all property of the defendants herein, be and the same is hereby discharged and ordered set aside and cancelled of record.

2. That judgment be entered in favor of the defendants and against the plaintiff in the sum of Three Hundred Ninety-one and 17/100 (\$391.17), being the balance in favor of defendants after deduction from the amount of damages due the defendants by reason of the failure of the plaintiff to complete work upon the defendants' dwelling house, to wit, Nine Hundred Seventeen and 25/100 (\$917.25), the reasonable value of the supplies furnished to the defendants by the plaintiff, to wit,

Five Hundred Twenty-six and 08/100 (\$526.08) Dollars; together with interest on said balance of Three Hundred Ninety-one and 17/100 (\$391.17) Dollars at 6% from date until paid, no attorney's fees or costs to be allowed either party.

Dated this 2nd day of December, 1949.

/s/ JOSEPH W. KEHOE,  
U. S. District Judge.

[Endorsed]: Filed December 2, 1949.

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[Title of District Court and Cause.]

To: Ben F. Gillette and Irene Gillette of Nome, Alaska, and to their Attorney, Chellis Carpenter of 220 Montgomery Street, San Francisco 4, California.

### NOTICE OF APPEAL

The Plaintiff herein, W. M. Gillis, hereby gives notice to the above parties that he appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this Action on December 2, 1949.

Dated December 27, 1949.

/s/ C. C. TANNER,  
Attorney for Appellant.

[Endorsed]: Filed December 27, 1949.



[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, W. M. Gillis, as principal, Joseph Wallace of Nome, Alaska, and Larry Galvin of Nome, Alaska, as sureties, are hereby held and firmly bound unto Ben F. Gillette and Irene Gillette, above-named Defendants, in the sum of \$250.00, lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 27th day of December, 1949.

The condition of the above obligation is such that:

Whereas, the above-named, bounden Plaintiff has filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, from that certain Final Judgment made and entered by the Judge of the above-entitled Court, on the Second day of December, 1949,

Now Therefore, if the Plaintiff, above named, shall prosecute said appeal to effect and answer all costs that may be adjudged against him if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ W. M. GILLIS,

Principal.

/s/ JOSEPH WALLACE,

Surety.

/s/ LARRY GALVIN,

Surety.

United States of America,  
Territory of Alaska—ss.

Joseph Wallace and Larry Galvin being first duly sworn, each for himself, says:

I am one of the sureties who executed the foregoing Bond on Appeal. I am a resident of Nome, Alaska. I am not a counselor or attorney at law, Marshal, Deputy Marshal, Commissioner, Clerk of any Court or other officer of any Court. I am worth the sum of \$500.00 over and above all my just debts and liabilities and exclusive of property exempt from execution.

/s/ JOSEPH WALLACE,

/s/ LARRY GALVIN.

Subscribed and Sworn to before me this 27th day of December, 1949.

[Seal] /s/ C. C. TANNER,

Notary Public in and for the Territory of Alaska,  
residing at Nome.

My Commission expires July 18, 1950.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE  
TRANSCRIPT OF APPEAL

W. M. Gillis, Plaintiff herein, having on the 27th day of December, 1949, filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment of this Court entered the 2nd day of December, 1949; and the said Plaintiff having on the 28th day of December, 1949, filed Motion for Extension of Time within which to file Transcript on Appeal,

It Is Now Ordered that the Plaintiff shall have up to and including the 24th day of March, 1950, within which time to file and docket the Transcript on Appeal in this cause.

Dated the 5th day of January, 1950.

/s/ HARRY E. PRATT,  
District Judge for the  
Territory of Alaska.

[Endorsed]: Filed January 9, 1950.

[Title of District Court and Cause.]

### PRAECIPE-DESIGNATION OF RECORD

To the Clerk of the District Court of the United States for the Second Judicial Division, Territory of Alaska:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, with reference to the Notice of Appeal heretofore filed by the Plaintiff in the above cause, Transcript of the Record in the above cause prepared and transmitted as required by law and by rules of said Court and to include in the said Transcript the entire record and all the proceedings and evidence in the Action; and include therein two Transcripts of the entire testimony taken in this Court and cause. (Transmittal of the entire Record to the Appellate Court is requested primarily for the reason that the Appellees' attorney resides in San Francisco, California.)

Request is further made that, along with the said Transcript of Record, you transmit the following:

1. Appellant's Statement of Points Relied Upon on Appeal and Designation of Portions of the Record Deemed Necessary for Consideration Thereof.
2. Affidavit of mailing copy of Statement of Points and Designation to Appellees' attorney, Chellis Carpenter, Mills Tower, San Francisco 4, California.
3. Money Order in the sum of \$25.00 for filing

Appeal in the Appellate Court and made payable to the Clerk thereof.

4. All stipulations in reference to this Appeal and which are delivered to you prior to transmittal of the Record: Also all affidavits in re service on Appellees' attorney.

Dated January 30, 1950.

/s/ C. C. TANNER,  
Attorney for Plaintiff and  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 30, 1950.

In the District Court for the Territory of Alaska,  
Second Division  
Case No. 3737 Civil

W. M. GILLIS,

Plaintiff,

vs.

BEN F. & IRENE GILLETTE,

Defendants.

Appearances:

C. C. TANNER,

Nome, Alaska,

Attorney for plaintiff.

O. D. COCHRAN,

Nome, Alaska,

Attorney for defendants.

### TRANSCRIPT OF TESTIMONY

The above cause came on regularly for trial at 10 o'clock, a.m., December 26, 1947, before Honorable Joseph W. Kehoe, at Nome, Alaska, and following is transcript of the testimony:

Court: Call your first witness.

Mr. Tanner: Call Mr. Gillis, please.

W. M. GILLIS

sworn

Direct Examination

By Mr. Tanner:

Q. State your name please.

(Testimony of W. M. Gillis.)

A. W. M. Gillis.

Q. Are you commonly known as Bill Gillis?

A. I am.

Q. What is your age? A. 45.

Q. Are you a resident of Nome, Alaska?

A. I am.

Q. How long have you been in Nome?

A. A little over three years.

Q. What is your occupation or business, Mr. Gillis? A. Building contractor.

Q. And how long have you been in that business?

A. Oh, approximately 25 or 30 years.

Q. How long in Nome?

A. A little over three years. [1\*]

Q. You are the plaintiff in this present action?

A. Yes.

Q. During the fall of 1946, did you perform any services in your line for the defendants in this action? A. I did.

Q. Now, Mr. Gillis, in general, what did that consist of?

A. That consisted of moving a house to the opposite side of the street, pouring a concrete basement, building on an addition to the house and several other small items.

Q. And, Mr. Gillis, did you furnish the labor for this work? A. Yes, sir.

Q. Did you furnish anything else?

A. Some materials, yes.

Q. Now tell us, if you will, the negotiations

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\* Page numbering appearing at bottom of page of original Reporter's Transcript.



(Testimony of W. M. Gillis.)

which took place between you and the defendants prior to the time of the commencement of this work.

A. On or about August 8th, I was working on the Masonic Temple over there and Mrs. Gillette came over to see me there and talked to me about this job. I told her at the time that we did not have time to do it. She was quite insistent about it, and said they had to get off of the beach and one thing and another, and I explained to her that we had contract work that we had to do and that we couldn't do it—that we simply had too much on the schedule, and that with the labor conditions as they were at the time, it was almost impossible to get men and that we did not have enough men. Later she talked to me about it and I told her if we did it at all, it would have to be done between [2] other jobs, but that I would try to get the house off of the beach before the fall storm; but outside of that—well, we could not drop other work and go ahead with that.

Q. You were under contract, were you, at that time, for other jobs?           A. I was.

Q. Well, go ahead, Mr. Gillis, and tell us about any other negotiations prior to that time.

A. They wanted to know approximately what it would cost. I could not furnish them the exact cost. I gave them an approximate cost on it which at that time, they thought was too much. They did say they would have the forms in ready for me to pour when we were ready. I told them if it could be worked out so it was ready, I could work the same crew.

(Testimony of W. M. Gillis.)

She said they would have the forms ready. Well, we waited quite awhile, but the forms were not ready and finally I went to Mr. Gillette and asked him what the score was going to be on it and he advised us to go ahead and put in the forms and go ahead with the job, which we did.

Q. Did that necessitate taking out other forms?

A. Yes, we had to take those forms out and rebuild.

Q. Prior to that time, were you given the order to go ahead on the work?      A. Yes.

Q. By whom?      A. By Mrs. Gillette.

Q. When did you commence the work?

A. Approximately Sept. 10. [3]

Q. About when services—at the time of the original negotiations, was there anything said about materials for doing the job?

A. Yes, that was one of the items. I told Mrs. Gillette we could not furnish the materials—they were very scarce in town. However, she told me that practically all the materials were on the job and they would furnish them if we would go ahead with the work.

Q. You have alleged indebtedness of the defendants for certain materials. What, in a general way, are you claiming for materials?

A. There were certain materials we were able to furnish.

Q. Now, Mr. Gillis, those were materials which had not been available on the job?      A. Yes.

(Testimony of W. M. Gillis.)

Q. And you were authorized to furnish these, were you, Mr. Gillis?      A. That is right.

Q. When, approximately, did your services end, Mr. Gillis?      A. On December 16th.

Q. Had the work been finished at that time?

A. No.

Q. Then why did the work end, Mr. Gillis?

A. Because Mrs. Gillette told us to stop the work and let it go.

Q. Will you tell us about that in detail, Mr. Gillis, please?

A. I had been around to the job that morning and I asked several times for materials, which they could not furnish, [4] and he said he did not know; and then about in front of the North Pole Bakery, I saw Mrs. Gillette. I had Mr. Newton with me that morning and I asked her if she had been able to secure the materials yet and she said, "No, I haven't and just let the whole thing go."

Q. And you considered that a command to quit work, did you?      A. I certainly did.

Q. What did you do then, Mr. Gillis?

A. I went down and packed up the tools and took the men off of the job.

Q. You allege in your detailed items of account, filed in this action, Mr. Gillis, that 987 hours of labor were furnished the defendants; is that correct?

A. Yes.

Q. How were these hours kept?

A. By daily time sheets.

(Testimony of W. M. Gillis.)

Q. Who kept those, Mr. Gillis?

A. I did, in the main.

Q. And outside of yourself, who kept them?

A. There was one other man that kept time about three or four days, but mainly I kept them every day myself.

Q. And on a daily record sheet, Mr. Gillis?

A. That is right.

Q. And then what method did you use after that to keep a record?

A. After that, the time slips were turned in every week.

Q. Who kept the books?

A. George Newton.

Q. Have you the original time slips in your possession, Mr. Gillis? [5]      A. I have.

Q. Now, Mr. Gillis, are these the original daily time slips kept by you for the work done on the Gillette property?

A. That is right, with exception of three or four that are in there.

Q. Which are those?

A. There are three of them right here.

Q. Give the dates, please, Mr. Gillis.

A. October 30, November 1 and November 7.

Mr. Cochran: Just a moment—if he is testifying from those there, they should be exhibited and marked exhibits.

Mr. Tanner: We are having him identify them.

Mr. Cochran: Well, I have a right to look at them——

(Testimony of W. M. Gillis.)

Mr. Tanner: Certainly. We are going to give you the right.

Mr. Tanner (After Mr. Cochran looked slips over): Any objection to having them introduced as evidence?

Mr. Cochran: No.

Court: These are simply the record of the hours?

Mr. Tanner: That is right, Your Honor. The daily record of the hours.

The Court: They may be received as evidence and marked "Exhibit A."

Mr. Tanner: Is Your Honor using the detailed statement of account in the file? I would like to have it if you are not.

Mr. Cochran: Is that the detailed statement?

Mr. Tanner: Yes. Mr. Gillis, I hand you this detailed statement of account which has been filed in this cause. Look over those various items of labor as set down, will you please? A. Yes.

Mr. Tanner: Were the labor hours that you have testified to actually put in on the dates that you have outlined in your item of account?

A. That is right.

Q. Now, take up, if you will, Mr. Gillis, the various items in detail; for instance, under "A" Item of Labor in your statement of account and tell us in detail what it was and the work done.

A. In item one, we had to take out the forms that were in the basement hole and clean them,

pulling the nails out and getting them out of the way.

Q. By the way, did you prepare the basement?

A. No, we put the basement on a new location for the grade that they told me they wanted on the house, which was established by two surveyors. It was necessary to raise the elevation of the present hole of the basement.

Q. Which had been performed by the defendants before you went on the job?

A. That is right, approximately one foot. They specified the point they wanted the grade taken from and the approximate point they wanted their wall.

Q. Were those after you had gotten on the job, Mr. Gillis?

A. That is right. To raise that to that point, there had to be a back fill put in. I asked them if they wanted me to do that or if they wanted to have it done, and I contacted someone to have it done.

Q. Whom did you contact? A. Ben Young.

Q. You say you had surveyors make that for you?

A. That is right, Mr. Long and Mr. Love. [7]

Q. Did you make a charge for that?

A. No.

Q. Why not, Mr. Gillis?

A. They did not make a charge to me.

Q. And so you made none to the defendants?

A. That's right. In item three we installed the forms, put in a reenforcement and poured the con-



(Testimony of W. M. Gillis.)

crete wall to the point and grade they asked for there. The reenforcing iron was hauled from the company and we put in that and put in the openings in the basement. There was no specification on the wall at any time or footings underneath the wall, and according to good standard practice, we poured that.

Q. And what was that?

A. Approximately nine inches.

Q. And what was the basement?

A. Approximately seven inches deep and seventeen inches wide, or approximately four inches wider than each side of the wall.

Q. Is that standard?

A. Yes, that is standard footing. After the basement was poured, the forms were torn down and the nails pulled out, and piled in the back of the lot. In Item No. 6, we raised the house from the location it was on, put it on the skids and prepared to move it onto the new location. No. 7, we moved the house from the old location to the middle of the street. We had to leave it there for awhile because there had to be light lines and telephone poles moved. That was just prior to the storm period and it was very hard to get the light company to move the lines. It was also hard to get hold of a cat to come in; in fact, we could not get one there. We finally did get them and the house was moved to the new location. [8]

After the house was moved to the new location, it



(Testimony of W. M. Gillis.)

was raised up approximately 3½ feet and then moved to the new basement; we framed it onto the house as near as we could tell what they wanted—there were no specifications, and we furnished materials, celotex, etc., for the new addition.

Q. Do I understand, Mr. Gillis, that from time to time you were directed as to what the defendants wanted when on the job?

A. That is right. No. 10, we applied the shingles to the new addition to the house. Item No. 11, we did some remodeling in the kitchen and of the stairway—it was moved to another location; in fact, a couple of times, as I remember. No. 12, placing fill-in around the basement. They directed me to have it filled in around the basement, which I did. Mr. Young and Eric filled in around the basement.

Q. Just a minute now, Mr. Gillis. Now, while we are on the labor issue, Mr. Gillis, you have alleged in your complaint and your detailed statement of account a charge for labor, as I understand your testimony, and your detailed statement of account, of 987 hours—is that correct? That you have sued for?

A. That is right.

Q. And the charge of \$2220.75?

A. That is correct.

Q. Now, will you state to us how you have arrived at that charge?

A. The 987 hours? Well we charge at the rate of \$2.25 per hour for that number of hours which gives us the \$2220.75. [9]

(Testimony of W. M. Gillis.)

Q. Now, how did you arrive—\$2.25 is your regular charge, Mr. Gillis?      A. That is right.

Q. And how long have you had that in practice?

A. Ever since we have been working here.

Q. And that is how long?

A. Well, I have done business here myself two years.

Q. And that has been in practice all that time?

A. Yes.

Q. You maintain a job sheet in connection with your work?      A. Yes, sir.

Q. And will you tell us how you have arrived at the \$2.25 an hour for labor?

A. Well, we use \$2.25 an hour as a base labor cost.

Q. Let me ask you this, Mr. Gillis—during your work as a contractor here in Nome, have you found it necessary to pay time and a half for overtime for the men you hire?      A. That is right.

Q. Has that been found necessary in order to secure labor?

A. Well, yes. That doesn't even secure labor half of the time.

Q. But you have found it necessary to do that?

A. Yes, that is right.

Q. And you have paid that?

A. That is right. Our \$2.25 over-all is based on 40 hours straight, 30 hours overtime on an over-all picture and on the hourly wages of the men

(Testimony of W. M. Gillis.)

that are paid. We found out when we first started——

Mr. Cochran: Now, I object to this. I don't care what his [10] custom is. The question we are interested in is how much labor did he put in on this particular job. Now, if he put them on other jobs and then worked them overtime on this one, that would make a difference——

The Court: There is no question about that so far. The question may be answered.

A. We found we could not work them overtime for one party. However, that was paid to the men; so the only thing we could do was establish a base wage rate to carry right straight through on every job all the way. That is why we established a base wage rate. During the working season of the year, we generally work ten hours a day, seven days a week.

Q. Does that over-all charge of \$2.25 cover your overhead as a contractor and builder? Is your overhead taken into account?

A. We try to make it cover our overhead. The only thing is not to furnish too many high priced men in one place.

Q. But in this case—this action, you are only suing for \$2.25—you are not claiming anything for overhead, is that right? A. That is right.

Q. And that has been your established rate since you have been operating in the last two years—is that right? A. Yes, that is right.

(Testimony of W. M. Gillis.)

The Court: Does this include your own time?

A. Yes, sir. [11]

The Court: At the same rate?

A. Yes, sir.

Mr. Tanner: You have had to employ men at a higher rate than that?

A. Yes, we do, even now.

Q. And some at a lower rate? A. Yes.

Q. And this is what you have found was the practical way to handle the situation?

A. That is the only way.

Q. So that, with you as manager of your business, Mr. Gillis, you get nothing for managing the business, but you get paid at the rate per hour, if you actually work, on the job yourself—is that correct? A. That is correct, yes.

Q. Have you paid the entire labor bill that you are suing for here, Mr. Gillis? A. I have.

Q. All of the men have been paid?

A. That is right.

Q. Now, referring to your detailed statement of your account, you show materials furnished and other items of expense. Will you take up the first item, for instance, which alleges six pieces of certain size celotex at \$4.00 a sheet; tell us about that.

A. That is material we lined the new addition with. I was able to get black celotex and I asked Mrs. Gillette if she wanted that and she said, yes, to go ahead and get it.

Q. From whom was that obtained?

(Testimony of W. M. Gillis.)

A. From the Glenn Carrington Company.

Mr. Tanner: Your Honor, we surrender for an exhibit here a receipted bill.

The Court: Well, I will preserve this until they are all entered and looked over by the other side.

Mr. Tanner: That will be perfectly agreeable with us, too, Your Honor. Now, let us take up the next item of three windows, etc., at a charge of \$52.30; those were made by you in the shop, were they?      A. Yes.

Mr. Cochran: That bill is correct and we know the bill for the celotex is correct.

Mr. Tanner: All right. Now, take the roof valley tin and bracket at \$3.50——

A. The tin was furnished by Mr. Gross. However, this should be roof valley which was furnished where the new addition meets the new roof. It was bought from Galvin. The actual charge was \$3.85 on the bill. The tin should not be there.

Q. And the charge was actually more than \$3.50?      A. It was actually \$3.85.

Q. Have you the bill for that?      A. I have.

Q. Now, speaking of valley tin, in your account you say you have a bill for the valley tin——

A. I have one from the Pioneer Sheet & Metal. However, it was never charged for.

Q. How much was that amount?      A. \$6.00.

Q. You have not charged it on this account; is that correct?

A. No, that was a mistake on my part—I did not get it in.

(Testimony of W. M. Gillis.)

Q. Now, taking the next item, you have concrete flue blocks, Mr. Gillis—— [13]

A. There were seven that we got from Galvin, furnished for the flue.

Q. Did you install them? A. I did.

Q. Have you a receipted bill for those flue blocks? A. I have.

Q. This bill includes other items, does it, Mr. Gillis?

A. Yes, we get our bills at the end of the month and there may be several things we have bought during the month for other jobs.

Q. You have alleged a charge of \$20.65—is that right, for the blocks? A. That is right.

Q. And that is the retail price in Nome?

A. That is correct.

The Court: These other items for \$30.00 and \$13.00 are not?

Mr. Tanner: It is just for the blocks. We will call it to your attention later on, Your Honor. Now, going to the next item, one keg of 16-d common nails, Mr. Gillis——

A. That's right. They were used on this job.

Q. Who furnished those? A. We did.

Q. From your own stock?

A. Yes, that is right.

Q. And you have charged \$12.00 for that keg of nails, Mr. Gillis; was that the retail price at that time for nails? A. It was, yes.

Q. Now, one keg of 8-d common; did you furnish that yourself? A. Yes.



(Testimony of W. M. Gillis.)

Q. And one keg of 6-d common, at \$12.00; did you furnish that from your own stock?

A. I did. [14]

Q. And was the retail price \$12.00 at that time?

A. It was.

Q. Now, form wire is the next item, Mr. Gillis; what about that?

A. That is wire we used in the forms. We bought 30 lbs. of wire from the Nome Motors. We furnished approximately 10 lbs. from our own stock, at 25c a pound, according to the bill from Nome Motors, and I charged that out of our stock at the same price per pound.

Q. Have you a bill from Mr. Harper?

A. I have a check here to cover the bill. That is the statement and here is the check to cover the statement.

Q. There are other things included in that check? A. Yes, there are.

Mr. Cochran: That is rather confusing—all the items included in the check——

Mr. Tanner: This represents the payment of these two statements? A. That is right.

Q. Which includes the payment of two statements, does it, Mr. Gillis?

A. Yes, that is right.

Q. And the form wire is included—is that right? A. Yes.

Q. Now, referring to the next item, eight pieces of 2x12x16 lumber. Will you tell us about that please, Mr. Gillis?



(Testimony of W. M. Gillis.)

A. Well, they were purchased from Lomen's and they were used in the beams underneath the house, and I think two of them were used at the time the house was moved.

Q. Have you a receipted bill for that purchase?

A. I have.

Q. Now, Mr. Gillis, you have made a charge against the defendants of \$31.01. Is that what you paid, Mr. Gillis? [15]

A. Yes, it is

Q. The next item, Mr. Gillis, is one bunch wood shingles—what about those?

A. Those were furnished by us from the shop.

Q. Was \$3.50 the retail price in Nome at that time?

A. That is what Lomen Commercial Company told me. I did not know the price.

Q. The next item is No. 1 fir finish, Mr. Gillis—

A. They were furnished from the shop.

Q. Was the \$3.00 charge the local retail price for such items?

A. That is right.

Q. The next item was siding strips at \$3.50?

A. That is correct.

Q. The next item is 2 lbs. siding nails at 40c.

A. Those were galvanized siding nails used on the asbestos shingles and were furnished by our shop.

Q. And that was the retail price?

A. Yes, that is right.

Q. The next item is three rolls of 15# felt at \$11.35, is that right?

A. That is right.

(Testimony of W. M. Gillis.)

Q. You purchased that?

A. We purchased that from the Nome Hardware.

Q. Have you a receipted bill for that, Mr. Gillis?

A. Yes, I have. It is on two separate bills here.

Q. This bill includes other items not necessary on this job, is that right?

A. Yes, that is right.

Q. Did these three rolls of felt you speak of go into the Gillette work? A. Yes, they did.

Mr. Tanner: If your Honor will notice, apparently those are two different purchases—two rolls at one time and one at another.

The Court: Yes.

Q. The next item is 20 lbs. of shingle nails at \$2.40.

A. Those were purchased from the Nome Hardware and the actual charge was \$2.50.

Q. Have you a receipted bill for that?

A. Yes.

Q. Did those nails actually go into the construction for the work done for the defendants?

A. That is right, they did.

Q. Now, the next item is sand and gravel for backfill and concrete, in the amount of \$261.00, Mr. Gillis.

A. That was purchased from the Arctic Oil Delivery.

Q. Have you a receipted bill for those items?

(Testimony of W. M. Gillis.)

A. Yes, I have.

Q. Was that sand and gravel which actually went into the defendants' work?

A. That is right. There are some other items on there, but I think they are marked.

Q. And you are asking the defendants for the same amount that was charged you for that and that you have paid?

A. Yes, that is correct.

Mr. Tanner: Here are the receipts from the Arctic Oil Delivery which Mr. Cochran has had in his possession, Your Honor.

The Court: This does not cover any other items? I think there are other items on there.

Mr. Tanner: The total amount is \$261.00, Your Honor. There [17] are two bills there I think that cover.

The Court: Well, this shows \$343.00.

Mr. Tanner: The segregation is made on the bill, isn't it, Your Honor? I did not glance at it just now——

The Court: Well, that would make it \$108.00 plus \$153.00——

Mr. Tanner: Yes. The total is \$261.00, as it appears, Your Honor. The sand and gravel you have testified to actually went into the defendants' job, is that correct, Mr. Gillis?

A. Yes, that is right.

Q. Now, the next item is rent on cat and concrete mixer, \$64.00 for the two, Mr. Gillis——

A. Yes, there were two bills.

(Testimony of W. M. Gillis.)

Q. Relative to the cat now, what were you charged for that?           A. \$54.00.

Q. And the concrete mixer?           A. \$10.00.

Q. Have you receipted bills for the payment of those items?

A. I have receipts for the payment of rent on the cat, plus other items. This covers various items from the same bill, and that bill is from Earl Coulthard. We rented the cat belonging to George Hite, but we rented it from Earl Coulthard.

Q. And that covers various items, including the rental of this cat?           A. Yes, that is right.

Q. Now, relative to the Gillette job and the charge of \$54.00 for the rental of the cat, is that a charge against the cat for just—only for the Gillette job, of \$54.00?           A. That is right. [18]

Q. And the rental on the mixer for \$10.00, was that actually for that job?           A. That is right.

Q. Have you a receipt for that?

A. I don't have a receipt for the mixer; I could obtain that. The mixer was rented from him—from Larry Galvin.

Q. And you have actually paid that?

A. That is right.

The Court: The total of those two items is \$64.00?

Mr. Tanner: Yes, Your Honor, \$64.00.

Q. Now, you have a charge of \$1.47 for the territorial service tax; is that right, Mr. Gillis?

A. That is right.

Q. Now, I will ask you, under "B," Materials Furnished and Other Items of Expense, were all

(Testimony of W. M. Gillis.)

of the materials listed under "B" of your Items of Expense and for which you have charged defendants, were they all used in connection with defendants' work?

A. That is right, they were.

Q. And the service or rental you have charged for was for the machinery used in connection with defendants' work? A. That is right.

Q. Covering your entire section under "B"; is that correct, Mr. Gillis? A. That is right.

Q. And you filed a lien in connection with this work, did you? A. Yes, I did.

Q. Where?

A. At the Recording Office here.

Q. Have you the original lien filed, Mr. Gillis?

A. I have.

Q. Was the date you filed it indicated by the Commissioner then?

A. Yes, that is right—March 14th. [19]

Mr. Tanner: We offer this in evidence, Your Honor.

The Court: It may be admitted and marked plaintiff's Exhibit "B." Mr. Tanner, are you through introducing items of account and receipts?

Mr. Tanner: I think so, Your Honor.

The Court: Have you any objection, Mr. Cochran, to those which are being introduced?

Mr. Cochran: I do object to some of the items, Your Honor, but not to the receipts.

The Court: You may take that matter up in your

(Testimony of W. M. Gillis.)

cross-examination. They may be admitted altogether as plaintiff's Exhibit "C."

Mr. Tanner: Do you know whether or not the defendants have been billed on these accounts, of your own knowledge, Mr. Gillis?

A. They have, yes.

Q. Covering the entire amount sued for?

A. That is right.

Q. Mr. Gillis, you have—have you checked up the total number of hours under your labor exhibit as to what it totals?

A. The total number of hours on those tickets I turned in total 1000 hours.

Q. Well, by your action here, you have sued for only 987 hours—

A. Well, there is a discrepancy of 13 hours, insofar as 13 hours had been billed for the window sash and frame, and that was deducted from the 1000 hours, leaving 987.

Q. Who prepared the window frames, etc., Mr. Gills? A. Mr.

Q. And he was taken off the job?

A. That is right. [20]

Q. So that in reality his 13 hours was charged against shop work? A. That is right.

Q. And so it was taken off of the daily time slip? A. Yes, that is right.

Q. Now, I note, Mr. Gillis, on the detailed statement of account, that you have labor from September 10th, inclusive, to December 16th, exclusive; is that correct, exclusive on the 16th?



(Testimony of W. M. Gillis.)

A. It should be December 16th, inclusive.

Q. There was an error made to that extent?

A. That is right.

Q. Now, I believe, in referring to your daily tabs of labor, the first one is on or about the 24th day of September; may I see the exhibit please? Yes; the first one on your list says the 24th of September. Now, you have stated that the work commenced on or about the 10th of September. Can you explain about this?

A. There was some work prior to that; in fact, prior to the 19th, there were thirty hours, but I guess that due to a misunderstanding of my information to the bookkeeper, he did not get that, but that wasn't sued for. There were approximately 19 hours in there.

Q. How many hours altogether?

A. Approximately 30 hours up to September 19th.

Q. Which actually went into the work?

A. That is right, yes. Between the 10th and the 24th, they were not turned in. Up until that time, the job had not officially started and [21] I kept that time in the book. I should have turned it over to the bookkeeper, but did not then, so consequently, the bookkeeper missed it entirely.

Q. So that you are not suing for that time between the 10th and the 24th?                      A. No.

Q. That is not included at all?                      A. No.

Mr. Tanner: You may cross-examine.



(Testimony of W. M. Gillis.)

Cross-Examination

By Mr. Cochran:

Q. On the 8th day of August, Mr. Gillis, Mrs. Gillette came to see you, I believe you stated?

A. As near as I remember, that is correct.

Q. On the 8th day of August; and she came to see you about moving the house they were living in. She wanted it moved across the street on the lot that they had purchased there; is that right?

A. That is right.

Q. Were you acquainted with Mr. Gillette?

A. No, I had heard the name, but did not know who he was.

Q. Did you know anything about Mr. Gillette's physical condition?

A. Someone told me he had hurt his leg.

Q. And was he on crutches?

A. I heard someone say something about it, but did not know anything about it.

Q. Now, when Mrs. Gillette came to see you, she came to see about getting the building moved from the south side to the north side of Front street; is that correct?

A. That is correct, yes, sir.

Q. And did she talk to you and anyone else, or just to you [22] alone?

A. As I remember, there was no one else there at the time.

Q. That was at your place of business?

A. No, it was at the Masonic Lodge.

(Testimony of W. M. Gillis.)

Q. Did you tell her that you would consider the matter or anything of that kind? Just what did you tell her?

A. As near as I can recall, I said we could not take on the work; that we had too much work and did not see how we possibly could do it, with the labor situation as it was.

Q. And you told her you could not do the job?

A. I told her I could not possibly do it at that time.

Q. Did you enter into writing at that time? The 8th of August?

A. The first time I talked to her about it, I entered into no writing. I don't know whether it was the 8th of August or not.

Q. Mr. Gillis, I will show you a photostatic copy. Is that one of your bill headings?

Mr. Tanner: If the Court please, let's have the original.

Mr. Cochran: If the Court please, I will in due time.

Mr. Tanner: Well, it seems to me there was some agreement entered—don't answer that question relative to the photostatic copy until the Court makes an order——

Mr. Cochran: I am going to use the original, Your Honor. Please examine the statement, and the writing, I am now handing you—and is that on your bill-heading? Is that your handwriting?

A. I imagine it is, yes. [23]

Q. Did you give this to Mrs. Gillette?

(Testimony of W. M. Gillis.)

A. I imagine I did—one or the other, either Mr. or Mrs. Gillette.

Q. Is that your handwriting?

A. I think it is.

Mr. Tanner: Check it over carefully and be sure, Mr. Gillis.

Mr. Cochran: Yes, I want that done too——

A. I would say that was my handwriting.

Q. Do you remember giving that to Mrs. Gillette?      A. Yes, sir.

Q. On that date? I don't remember the date.

Q. That is the correct date as to when it was made out—is that correct?

A. I could not swear to that.

Mr. Cochran: Now, I would like to have this marked for identification. I will offer this in evidence, Your Honor.

The Court: You have had a chance to see it, have you, Mr. Tanner? Have you any objection?

Mr. Tanner: No, Your Honor.

The Court: Very well. It may be admitted as defendant's Exhibit No. 1.

Mr. Cochran: Now, that statement shows "pouring a basement"?      A. That is right.

Q. And to move the house?

A. That is right.

Q. And to complete addition to the house, as shown by a map?      A. Yes, sir.

Q. You had a plat at that time, did you?

A. No, sir.

(Testimony of W. M. Gillis.)

Q. What did you mean then, "Complete new addition as shown"?

A. Well, they said they had a sketch and they told me they wanted the corner of the house filled out. [24]

Q. Did you see the sketch?

A. I think at one time I did.

Q. Does this have reference to that sketch?

A. I could not say as to that.

Q. In this, it is provided you should do no work on the interior of the old house?

A. That is right.

Q. And you were to do no plumbing?

A. That is right.

Q. No wiring? A. That is right.

Q. No painting? A. That is right.

Q. And all materials to be furnished by the owners? A. That is right.

Q. And the moving was to be completed in October?

A. That is right, as near as I understood.

Q. And the price was to be \$2872.28?

A. That was approximately as near as I could figure it at that time.

On the 26th day of December, at 1:30 p.m., the following proceedings occurred:

The Court: You may proceed in this case, Mr. Cochran——

Mr. Cochran: Yes, I am ready, Your Honor. Now, Mr. Gillis, at the time that this paper was

(Testimony of W. M. Gillis.)

given to Mrs. Gillette, was there a sketch of the premises—that is, what was to be done?

A. I don't know. I don't remember seeing it if there was.

Q. Well, Mr. Gillis, refresh your memory if you will, please, and see if that was given to you at the time Mrs. Gillette talked the matter over with you. [25]

A. It was never given to me—anyway, I don't remember; it might have been given to me, but I don't remember it.

Mr. Cochran: I ask that it be entered for identification——

A. I don't remember it——

Q. Didn't you have the sketch at the time you figured on the price when you made this written statement?

A. I don't remember the sketch. I may have seen it at the time we were talking about it. It may be the one or a different one, so far as I know.

Mr. Cochran: Please mark it for identification (to clerk). Have you any sketch that you made at the time?

A. I have none.

Q. At the time Mrs. Gillette came to see you, when you were working on the Masonic Temple building, she explained to you what they desired to have done, didn't she?

A. Approximately, yes.

Q. And were you familiar with the building at the time she talked to you? A. I was not.

(Testimony of W. M. Gillis.)

Q. Did you familiarize yourself with the building subsequently? After that time?

A. Yes, sir. Yes, I took a look at it.

Q. The building extended back from Front street over the beach sand—is that correct?

A. Yes, sir.

Q. And had a bulkhead around it?

A. Not that I remember.

Q. There were some timbers, 10x10 or 12x12, were there not?

A. I could not swear as to that.

Q. Now, when did you begin the moving of this house? [26]

A. I could not give you the exact date on that.

Q. Well, can you refresh your memory and tell me when you began on it—from your time slips?

A. I don't know whether I could or not—that is, when we actually began to move the house. It was before the last bad storm last year, if that has any bearing on it.

Q. Well, was it September?

A. I believe it was October.

Q. Who did you have employed?

A. Earl Coulthard.

Q. Did you have anyone employed with the caterpillar? A. Yes.

Q. Just to move the building?

A. That is right.

Q. What did you have to do to the building first, to move it?



(Testimony of W. M. Gillis.)

A. We had to put skids under it.

Q. Did you have to pick it up?

A. We probably had to raise it a little on the sidewalk.

Q. Then you dragged it out into the street?

A. That is right.

Q. And left it there?           A. For awhile, yes.

Q. Was it level?           A. Fairly well so, yes.

Q. Now, this building had a concrete flue in it, didn't it?

A. That is right—a concrete block flue.

Q. Now, was that in good condition?

A. Not too good.

Q. What was the matter with it?

A. The mortar was loose.

Q. Did you take it down?

A. Not at that time, no.

Q. Did you brace it up so as to move it at that time—before you moved it? [27]

A. We cut it off in the basement.

Q. Did you put any braces in there to hold it?

A. Yes.

Q. And you cannot give me the date—can't you look at your time slips and tell me that?

A. No, I don't think so; they do not show what was done, exactly, on that date.

Q. Now, you undertook to move the house—that is correct?           A. Yes, that is right.

Q. From its location on the south side of Front street to its location on the north side?



(Testimony of W. M. Gillis.)

A. That is right.

Q. And you understood specifically that you were not to do any work inside the old house—any carpenter work in the old house?

A. Yes.

Q. And it was specifically understood that you were to do no plumbing? A. That is right.

Q. And no wiring? A. That is right.

Q. And also specifically understood you were to do no painting? A. That is right.

Q. And also understood that all materials were to be furnished by the defendants?

A. That is right.

Q. You were definite in stating that situation?

A. Yes, because we could not furnish the materials.

Q. And that was one of the reasons you were definite about it? A. That is right.

Q. Then you said that the moving operations would be completed in October?

A. Approximately at that time; we thought then it could be done in October. [28]

Q. You did not make any specifications?

A. The specifications were made when I talked to them.

Q. And the price for which you were to do that and complete the work was \$2872.28?

A. That was approximately the labor cost for the job.

Q. Did you put it on this statement—that it

(Testimony of W. M. Gillis.)

was "approximately"? A. I did, I think.

Q. Give me the statement. Is that—did you put on the statement it was "approximate cost" or the "cost"? Were they told that that would be the approximate cost? A. Yes.

Q. Why didn't you put down it would be the "approximate cost" on that? Why didn't you write in that word?

A. Because I did not consider that a contract. It was an approximate estimate.

Q. Well, did you tell them it was an approximate estimate? A. That is right.

Q. But you did not put it down in writing. Now, give me those time slips, if you please. Now, Mr. Gillis, will those time slips refresh your memory as to the time when you moved the building?

A. No, I don't think it was listed here. The basement was poured before that time, and I don't think it is listed here as to when the actual date the building was moved.

Q. Well, all you had to do was put some skids under it, wasn't it? [29]

A. Well, there were things that had to be moved and it had to be raised on the front side.

Q. That wasn't over a day's work to get that building prepared to move, was it?

A. I don't remember.

Q. How long did you take in preparing this building to move?

A. I couldnt tell you that for sure.

(Testimony of W. M. Gillis.)

Q. Now, when you moved it, Mr. Gillis, you moved it out into the street; did you move it out into the middle of the street?

A. We moved it into the street.

Q. And how long did you leave it there in the street before you did anything more to it?

A. I could not say exactly.

Q. Why didn't you move the building across the street to the lot?

A. Because we were stopped on account of light poles.

Q. Did you find that out when you put it into the middle of the street?

A. No, we knew that, but that was during the storm, and the main idea was to move it across the street so it would not wash away, and we could not get the Northern Light & Power to move the lines when we wanted them to. The lines had to be loosened and the poles pulled back.

Q. Did you cut off the corner of this building?

A. The corner of the cornice.

Q. When did you cut that off?

A. When we got ready to move it on through.

Q. Did you move the light poles?

A. We moved the top of the poles, but not the bottom.

Q. Well, was there any reason why you could not take it around the Thornton building?

A. We couldn't get it through there. [30]

Q. Mr. Hite moved the O'Farrell building through there, didn't he?

(Testimony of W. M. Gillis.)

A. I don't know about that.

Q. Was it necessary to cut off this building on the cornice to get it between the Thornton Building and the light poles?

A. Yes, it was necessary.

Q. There was not enough space without cutting that corner off? A. That is right.

Q. Didn't the building clear the space between the Thornton Building and the light pole when you moved it? A. The building did, yes.

Q. But the cornice would not have cleared, or did not clear? Well, why didn't you have to cut it off the whole side of the building then?

A. It did not affect the rest of the building where it went through there. It had to be taken through at an angle, so that it required taking off only one corner of the cornice to get it through.

Q. But the building is square, isn't it?

A. No, sir, it is wider than it is long.

Q. But it is square on each side where you cut off the corner, isn't it? What I am trying to get at is why you had to cut off one corner of the cornice—why, if you had to cut that off, didn't you have to cut off the whole thing?

A. Because the building had a projection on one side. That is where the building—we squared the building up——

Q. Now, that cornice is in the same condition as it was then, isn't it? A. No, sir. [31]

Q. When did you fix it; why didn't you fix the balance of it?

(Testimony of W. M. Gillis.)

A. We were called off the job.

Q. On the 16th day of December; is that correct?

A. Yes.

Q. You were called off the job. Was there snow on the ground the 16th of December?

A. I don't know; I suppose there was.

Q. That was after the freeze-up, wasn't it?

A. Yes.

Q. Did you make the excavation for the basement of this building?

A. No, sir.

Q. Who did?

A. I could not say as to that.

Q. Did you put in the forms for the concrete basement?

A. Yes.

Q. You did?

A. Yes, sir.

Q. Well, you say the forms were not put in right; did Mr. Harper put any forms in there?

A. He tried to, I guess.

Q. Did he consult you, Mr. Gillis?

A. He came and wanted to know why we didn't put in the forms.

Q. That was part of your agreement, was it?

A. No, sir, the forms were to be in when we were ready to pour it.

Q. And when you went there, they were ready, weren't they?

A. No, sir, the forms were not. There was part of an outside form, but no places—no wires.

Q. Did you have to tear them out?

A. That is right.

Q. All of them?

A. That is right.

(Testimony of W. M. Gillis.)

Q. Were they all put in wrong.

A. I would not say that they were all put in wrong, but he did not complete them.

Q. Did you give your personal attention to the matter of the forms?

A. When we put them in? [32]

Q. Yes, we will say when you put them in.

A. Yes.

Q. Did you look at the forms that Mr. Harper put in, what there was of them? A. Yes.

Q. Did Mr. Harper talk with you and consult with you about them?

A. I saw him a time or two in the restaurant, and he said he did not know anything about it, and why didn't I do it?

Q. Well, did you understand that you were to put in the forms?

A. Not at that time. The Gillettes had to have the forms in and they said Mr. Harper would do it.

Q. And did Mr. Harper consult you as to how the forms were to be put in?

A. No, I don't remember that he did. It is possible that he did, but I don't remember much about it.

Q. Now, you had been working there in September on the moving, hadn't you? A. Yes.

Q. And several days—and the latter part of September, you had several of them done?

A. Yes, sir.

Q. And so you began the work then sometime in September?



(Testimony of W. M. Gillis.)

A. I could not say as to that. We were working on the basement, but when the building was moved on, I could not say.

Q. What were you doing?

A. We were pouring the basement.

Q. In September?

A. The latter part of September, I am pretty sure.

Q. Isn't it a fact, Mr. Gillis, that at that time you had moved the building into the middle of the street?

A. I don't think so. I think the building was moved in October. [33]

Q. Now, you started to move the building on the 14th of October, didn't you?

A. I could not say as to that.

Q. Haven't you any books or records that will show that?

A. Actually the moving?

Q. Yes.

A. I think not.

Q. How long were you in moving the building over to its foundation after you commenced moving it?

A. I could not say as to that exactly.

Q. Now, did you pour the cement basement?

A. That is right.

Q. And you poured the floor in the basement, did you?

A. We did not.

Q. Why didn't you do that?

A. Because we were told the ground was frozen and we could not pour it.



(Testimony of W. M. Gillis.)

Q. Well, you agreed to pour a full basement, didn't you?      A. I did.

Q. But didn't pour the floor; and you would call the walls a complete basement?

A. That is under the complete house if classified as the basement.

Q. Well, you never poured the basement then?

A. No, sir.

Q. Did you intend to do it when you gave Mrs. Gillette this writing?      A. No.

Q. Why didn't you?

A. Because she said it was frozen and would have to go till next year.

Q. Why?

A. We could not very well start to pour until the house was moved over. I don't know whether we started to move it before the pouring was done or not. We could not [34] pour the basement and the floor at the same time. If we had poured the floor, it would have been unprotected and any storm or any freeze would have hurt the floor.

Q. Well, you could have poured the floor later, couldn't you?      A. That was our intention.

Q. It was your intention to pour afterwards?

A. Yes.

Q. Now, you say there was a fill-in in the basement?      A. Yes, in the excavation——

Q. And did you—before you fixed up the forms, did you fill in before that?

A. I think the other forms were taken out and the boys were working on it.

(Testimony of W. M. Gillis.)

Q. And you had to get your foundation for the sides before you could pour your cement, didn't you?

A. Would you clarify what you mean by "foundation" for me, please?

Q. Well, you have to have a foundation to pour your cement on, don't you? You don't pour it on loose gravel, do you?

A. Yes.

Q. On loose gravel?

A. It was levelled with the cat in there.

Q. The bottom of the form for the walls?

A. The forms were not in there at that time—I don't believe I understand——

Q. Well, what I am trying to get at is that you poured the walls of the basement, and before you poured those, you filled in what you call "back-fill" in the basement; is that right?

A. Yes, that is right.

Q. And you raised it up how far?

A. I would say somewhere about eight inches.

Q. And you put that down there and scattered it, and did you dump with the cat down there, and level the floor?

A. That is right, the gravel was dumped with the truck——

The Court: Who did that?

A. Ben Young.

Mr. Cochran: How did he get the cat into the pit?

A. I did not have anything to do with that. I merely was having it done for them.

(Testimony of W. M. Gillis.)

Q. Then you did not have anything to do with preparing the base for the side-walls?

A. We put our footing under the side-walls, if that is what you mean.

Q. How do you account for that—was that a proper basement?

A. That was standard of footing, yes.

Q. Well, standard form for a basement is to put it down and tamp it down before you pour the concrete, isn't it?

A. It did not do much good.

Q. How do you account for the walls cracking?

A. I don't know.

Q. Did you know that the walls cracked? What would cause that?

A. That could be caused by a lot of things.

Q. Well, do you know what would account for it?

A. No, sir.

Q. Have you examined them?

A. No, sir.

Q. Did you examine those walls prior to the 16th day of December?

A. Yes, sir.

Q. And were they cracked?

A. Not that I saw at that time.

Q. Now, is it standard form where the walls crack?

A. If you want to guard against and protect your walls, you waterproof the outside of them——

Q. Well, did you do that, Mr. Gillis?

A. No.

Q. Why didn't you?

A. I had nothing to do it with.

(Testimony of W. M. Gillis.)

Q. And Gillettes did not have anything to do it with?  
A. Not that I knew of.

Q. You never heard of it?

A. Heard of water-proofing?

Q. Heard that they had about 50 gallons?

A. They could have had—I don't know——

Q. And isn't it a fact that they asked you to put that on the sides of the walls?

A. Not that I know of.

Q. Did you pour that concrete before freezing weather?

A. I think so; the concrete did not freeze, at least.

Q. Freezing weather setting in was the reason why you did not pour the floor in the concrete basement, was it?

A. You mean before we moved the house?

Q. Well, did freezing weather set in before you moved the house?

A. I don't remember for sure.

Q. Now, you knew it was necessary, didn't you, Mr. Gillis, on the 8th day of August, when you gave this writing to Mrs. Gillette, you knew then that, to protect the concrete basement, the building must be moved before freezing weather, didn't you?

A. No, sir, that had nothing to do with protecting the basement.

Q. You had something to do with the moving of the house, didn't you?

(Testimony of W. M. Gillis.)

A. I had nothing to do with the pouring of the basement.

Q. And in order to enable you to pour the basement, it was [37] necessary for you to do that before freezing weather, wasn't it?

A. At the time the basement was poured, it did not freeze. It was in good shape.

Q. Didn't you say in your direct examination you commenced your work on September 10th?

A. I think right in there, yes.

Q. Then tell us what you did on the 10th of September.

A. I think we put up corner boards—I cannot say exactly.

Q. You said in your direct examination that you commenced work on the 10th of September; then tell us what you did.

A. Well, I don't remember exactly, but we put up the corner boards first, and the forms were taken out and cleaned and then we started the building of the forms we were to use in there——

Q. Then you remember now that you did commence work on the 10th of September.

A. We commenced work on the basement at that time. That is what our daily time sheets show.

Q. Did you pour the concrete then?

A. After we had the forms in——

Q. You did not put in the forms, the forms were there, and you tore them down, didn't you?

A. We had to put in another set of forms.

(Testimony of W. M. Gillis.)

Q. Well, then you commenced the 10th of September, didn't you, Mr. Gillis?

A. That is when we first worked. Our time sheets shows that.

Q. When did you move the house onto the foundation? [38]

Mr. Tanner: Well, if the Court please, the witness has testified several times that he could not say the exact date he moved the house——

Mr. Cochran: Well, was it in September?

A. I think it was October.

Q. Well, was it the early part of November, or was it in October?

A. I think it was October.

Q. Now, in this writing that you gave here, which I have called a contract——

The Court: Call it what it is marked——

Mr. Cochran: Well, I maintain it is a contract.

The Court: Is it marked as an exhibit?

Mr. Cochran: Yes, Your Honor.

The Court: Then, let's get it in as an exhibit and not as a contract. It is only for identification, I take it——

Mr. Cochran: Yes, Your Honor. Now, Mr. Gillis, how long were you, from the time you commenced the moving of this house, until you got it onto the foundation?

A. I could not say exactly; I don't have it marked down.

Q. Did you get it onto the foundation before fall set in? A. No, sir.



(Testimony of W. M. Gillis.)

Q. There were 987 hours charged to the moving of this building; is that correct?

A. Yes, that is right.

Q. Did the men that were employed there work on this building and the moving of it all the time?

A. You mean only that building? No, sir. [39]

Q. Did you pull men off of that job at various times and send them other places?

A. That is right, yes.

Q. And how did you segregate their time then?

A. The time was kept each day.

Q. For the time they were employed on this job?

A. Yes.

Q. How long were you pouring this concrete?

A. A little over ten hours.

Q. How many men employed on the pouring of the concrete?

A. I could not say exactly; there were quite a few.

Q. How many men should have been pouring?

A. Well, it takes quite a few; it depends on the size of the mixer.

Q. Well, I am asking you how many you had to do it there?

A. It takes quite a crew; I imagine there were 12 to 14 men.

Q. To pour concrete walls?

A. I imagine.

Q. What would they be doing?

A. The general work that is to be done around a mixer when they are pouring.



(Testimony of W. M. Gillis.)

Q. It takes one man to run the mixer, doesn't it?

A. That is right.

Q. And the rest of it is in pouring the mixture down the forms?

A. No, the mixer has to be loaded——

Q. It is automatically loaded, isn't it?

A. No, sir, it has to be shoveled.

Q. You had one man shoveling?

A. No, several, and filling up the wheelbarrow.

Q. And you mean to tell me that it took 12 men?

A. There were approximately 12 men—somewhere in that vicinity. [40]

Q. What was the size of this basement?

A. I don't remember the size; it should be given on there.

Q. The size of that building is 24x30, is that right?

A. I imagine it is.

Q. And the basement would be the same size?

A. I think so, yes.

Q. So that ten hours was ample time to pour the concrete basement that you poured, wasn't it?

A. I think it took us a little over ten hours.

Q. You don't know definitely the number of men you had employed then?

A. I could not say offhand, no.

Q. Now, Mr. Harper I understood you to say, had sunk this basement too deep, is that right?

A. I don't know who had done it.

Q. Well, it was too deep, was it, Mr. Gillis?

A. It was deeper than the height of wall they

(Testimony of W. M. Gillis.)

asked for and the point of grade they asked to start from.

Q. What do you mean? Do you mean the depth?

A. The grade, the point at the top of the basement; that is what I had Mr. Long and Mr. Love do, to give me a grade from that point.

The Court: It would be a level spot from which to build, is that right? It would be a line from which to figure or go from?

A. Yes.

Mr. Cochran: You mean a certain spot on the lot?

A. No, I mean a certain point—a certain elevation. [41]

Q. And who did you say gave you that?

A. Mr. Love and Mr. Long.

Q. And how did they establish that?

A. With their instruments.

Q. My goodness alive, how deep was the basement to be?

A. Below grade, or below the top of the basement.

Q. Well, how deep?

A. Approximately seven feet, I don't remember for sure.

Q. Is that what you mean by grade—the depth of the basement?

A. No, a grade line is a level line where the point of the building will come, so we have something to go by.

(Testimony of W. M. Gillis.)

Q. And Mr. Long and Mr. Love established the point of the height of the basement?

A. That is right.

Q. And how did they establish that, arbitrarily?

A. They established it with their instruments.

Q. Now, you say, in defendants' exhibit No. 1 that you are to complete new addition as shown. What do you mean there by "as shown"?

A. Well, according to the way they were to show me what they wanted there in their new addition. We talked about the corner of the house where there had been a porch on there, and they wanted that finished on out, to make a room on it.

Q. Wasn't that as shown on this plat?

A. It probably was, if that is a plat of it—I don't remember a plat.

Q. Did you complete that addition?

A. No, I did not. [42]

Q. What was the size of that?

A. I don't remember for sure; it was approximately 8x14, I believe.

Q. Well, the size was 7x17; is that correct?

A. It could be, I don't know. I don't remember offhand what the size of it was.

Q. Now, the complete new addition as shown that was to be built on the end of the building, wasn't it in one corner?

A. Across the end of the building—across one corner.

Q. Now, do you recall that that was what was shown on this plat?

(Testimony of W. M. Gillis.)

A. I don't remember the plat.

Q. Well, you did not build that, did you?

A. Sir?

Q. You did not put that across the back of the building, did you?

A. We put part of it on there, yes, sir.

Q. You put that on the east side?

A. I think it is on the north side.

Q. You built nothing on the west side at all?

A. Part of that addition was built on the west side; it is on the northwest corner.

Q. Now, then, what you built consisted of a wall and one side, did it, Mr. Gillis?

A. That is right.

Q. And that was 7x17?

A. It could have been.

Q. And did you finish that? A. No, sir.

Q. Well, why didn't you finish it?

A. Well, one reason, the material wasn't available and the other reason because Mrs. Gillette said to let the thing go.

Q. What material was not available, Mr. Gillis?

A. Well, asbestos shingles, etc.

Q. But you put asbestos shingles on that west side, didn't you?

A. If there were any left, the boys did not think they were good enough to use, and there were not enough to complete the job.

Q. Did you put anything under the shingles, any tar paper?

(Testimony of W. M. Gillis.)

A. Well, we put asbestos pads under that. I think there was tar paper if I remember right.

Q. And you don't know whether or not you tar-papered that?

A. I don't remember for sure.

Q. Now, you made a roof for it?

A. That is right.

Q. And that was 7x17?

A. The roof was bigger than that.

Q. Well, it has a pitch—it is about 18 inches by about—19x8—18x8?

A. Well, the roof would be longer than that because it extends onto the other roof.

Q. What is the maximum size of that roof you put on?

A. I could not say; we could figure it up.

Q. Now, all the work you did on that consisted of building one side, 17 feet long, and the end of it, 7 feet, and the roof; is that right?

A. No. We put in the windows and door frames, lined part of it, put in partitions, put in stairways—

Q. Well, that is the size of the wall you put in, 17x7, isn't it?

A. I imagine that is very close.

Q. Well, of course, we cannot tell much about your imagination, if you don't know— [44]

A. Well, I could not tell unless I went down there and measured it.

Q. What was the height of that wall; 17 feet?

A. Approximately, yes.

(Testimony of W. M. Gillis.)

Q. Do you mean it took 300 pounds of nails to build that?      A. No, sir.

Q. You have them charged with 300 pounds of nails in one place and about 25 pounds of nails in another place——

A. It takes lots of nails for concrete forms and runways.

Q. What do you mean by “runway”?

A. To wheel the cement in to the forms, there has to be a runway clear around there.

Q. And you used 300 pounds of nails?

A. Yes, approximately.

Q. You said you had to strip the forms; now, did that take long?

A. It takes quite awhile.

Q. About how long?

A. That I could not say, offhand.

Q. Did you have to take all of the forms down that Mr. Harper put up?

A. We did take them all out, yes.

Q. And rebuild them?      A. Yes.

Q. One objection was that they were not wired?

A. They were not ready, no.

Q. The forms were nailed?

A. Yes, the part that we did take down and Mr. Gillette had hired that done, apparently.

Q. You did not pay Mr. Harper for putting in those forms and pouring of the concrete, did you?

A. No, sir. [45]

Q. Now you—this work on the east side on the

(Testimony of W. M. Gillis.)

addition—on the north side of the present building, you stated you had not finished that?

A. No, sir.

Q. Did you find the sump down in the basement?

A. No, sir, when I first looked at the hole, there was a steel barrel partly sunk there.

Q. Did you fill that in?           A. I did not.

Q. It was not filled in?

A. It might have been, but I did not fill it in because I did not fill in the basement.

Q. It was sunk for a sump?

A. I think so.

Q. Whether it is still there or not, you don't know?

A. I don't think it is; I could not swear to that.

Q. Now, on the north wall—that was just knocking out a portion of the wood there, wasn't it?

A. It was supposed to be a room.

Q. There was no porch there? But that is what it is——           A. A room is built on there.

Q. And what did you do toward the side of that building—the north end of the building; did you put any tar paper on it?

A. I don't remember for sure.

Q. Did you finish it on the outside?

A. No, sir, we did not finish it on the outside.

Q. Did you finish the roof?

A. I think so, yes.

Q. What did you put on there?

A. Wooden shingles. [46]

Q. And that took one bundle of shingles?



(Testimony of W. M. Gillis.)

A. No, they furnished some shingles.

Q. Well, they had 6000 feet of lumber for you to use there, didn't they?

A. I don't know how much they had.

Q. There was lots of that there, wasn't there, and still lots of it there?

A. I could not say how much there was.

Q. Now, you braced the house up?

A. What do you—I did not take any braces out of the house.

Q. The house wasn't braced on the south side of the street?

Mr. Tanner: Pardon me, I don't believe the witness understood your first question.

Mr. Cochran: Did you put any braces back under the house to hold it up?

A. Under the beams, temporary ones.

Q. Didn't you put in any permanent ones?

A. There were supposed to be permanent ones put in there, yes.

Q. Did Mr. Gillette come to see you about putting them in?

A. Well, there were two 6x12 beams under the house and the 6x6 posts, or whatever timber was needed, but they were never put in because we never finished. We did not finish pouring the basement because Mrs. Gillette said it could not be poured that winter.

Q. Did you keep a fire under the building after it was moved over there?

A. Part of the time we kept our own fire, yes.

(Testimony of W. M. Gillis.)

Q. There was a furnace there, wasn't there?  
Did you keep a fire in it?

A. Duke Metrovich took care of the fire in the furnace part of the time. [47]

Q. Did you put in a stairway down in the basement?  
A. That is right.

Q. And did you—it was a sort of a temporary affair, wasn't it?

A. No, I think that was permanent, if I remember.

Q. And you recall that permanent stairway?

A. Well, it could not be set to permanent grade, because the floor wasn't there yet.

Q. Now, you have in your statement here three rolls 15# felt; where did you use that on this building?

A. We used it underneath the roof and underneath the valleys. And, oh, I don't remember for sure—it was possibly put under some of the shingles that were put back on.

Q. It did not take one-half roll to cover 7x17, did it?

A. It depends on how you lap it, and the conditions under which you use it.

Q. There were 300 lbs. in a roll?

A. Yes, I believe so.

Q. And it is three feet wide?

A. 34 or 36 inches, I believe.

Q. And you think you have—might have used some of it under the roof?  
A. I think so.

Q. And where else, Mr. Gillis?

(Testimony of W. M. Gillis.)

A. Probably some on the sides and some of it to cover up windows until we got the work done; it was used on the job anyway.

Q. It was used somewhere about the building—three rolls?

A. That is right. I don't remember whether there was any left there or not when we left.

Mr. Cochran: That's all. [48]

### Redirect Examination

By Mr. Tanner:

Q. Just a moment, please. Mr. Gillis, speaking of the cornice that was cut off of the house you testified to, was that done with the knowledge and approval of the defendants?

A. That is right. She was told about it and consented that it be done—that's right.

Q. Now, relative to the taking out of the forms that were in there for the basement, was that taken up with the defendants prior to taking them down?

A. That is right, and it was explained to them why it was necessary. There were not enough forms in there that we could go ahead with. In fact, when we talked about the job originally, we said if they could have them in when we went down, when we got done at the Northern Commercial, so we could move the concrete mixer there, it would speed things up. Well, we waited quite awhile for them and they were not ready, and finally I went to

(Testimony of W. M. Gillis.)

see Mr. Gillette and asked him about it; and he asked me why didn't I go ahead and do the job.

Q. Why was that necessary?

A. Well, they were not the kind of forms we could use in there; in fact, if we were to have used the forms in there, it would have taken us longer than the time it did take us.

Q. Now, you mentioned Duke Metrovich relative—you stated that he kept the furnace going, did you?      A. That is correct. [49]

Q. And you had nothing to do with that?

A. No, sir.

Q. And you had nothing to do with the plumbing?      A. No, sir.

Q. Now, the cracking of concrete was mentioned. What might cause properly poured concrete to crack?

A. Well, there are any number of things that might cause it. If it is on frozen ground, it is liable to crack; any one of a number of things might cause it to crack. It is not always because it is on frozen ground. The bank's foundation is cracking and it is a much bigger and heavier foundation than this one.

Q. If the Court please, at this time I would like the privilege of asking the witness one more direct question. Mr. Gillis, you testified on direct examination that defendants have been billed in reference to this account?      A. Yes, that is right.

Q. Have they ever contacted you in reference to the account?      A. No, sir.

(Testimony of W. M. Gillis.)

Mr. Tanner: You may cross-examine.

### Cross-Examination

By Mr. O. D. Cochran:

Q. You never went to see them about this account, did you?

A. They were billed for it.

Q. My question was that you did not go to see them——

A. No, sir.

Q. At any time?

A. After we left the job?

Q. Please answer the question.

The Court: Answer the question. Did you ever go to see them [50] concerning this account?

A. Not after we left the job, no—not that I remember.

Mr. Tanner: That is all, Mr. Gillis.

Mr. Tanner: Call Mr. Newton.

### GEORGE NEWTON

sworn.

### Direct Examination

By Mr. Tanner:

Q. State your name, please.

A. George Newton.

Q. You live here in Nome, do you?

A. Yes, sir.

Q. Are you employed with Mr. Gillis?

A. Yes, sir.

(Testimony of George Newton.)

Q. Were you so employed last fall, September of last fall?      A. Yes, sir.

Q. Do you handle the books of Mr. Gillis?

A. Yes, part of them.

Q. Do you send out the statements on the work that you have done—that Mr. Gillis does, and so on?

A. Yes, sir.

Q. Mr. Newton, did you at any time send to the defendants a detailed statement of account subsequent to the time that Mr. Gillis stopped work on the Gillette property?

A. I believe I sent one at the end of November—just on the doors and window frames, on the \$52.50 bill.

Q. Sometime in November of 1946?

A. Yes, I think so.

Q. And did you retain a carbon copy of that?

A. Yes, sir.

Q. Have you that copy?      A. Yes, sir.

Q. May we see it please? (Mr. Newton presented copy.)

Q. Is this a carbon copy of the statement that you sent to the defendants?

A. That is a carbon copy of the statement I believe I sent at the end of November. [51]

Q. And you sent the original to the defendants?

A. Yes.

Q. This represents what?

A. The triple frames and the door.

Q. The work that was done in the shop that has been testified to?      A. Yes.



(Testimony of George Newton.)

Mr. Cochran: What is the purpose of this?

Mr. Tanner: The purpose is that we want to show that the defendants have been apprised of this entire account.

Mr. Cochran: And so what?

Mr. Tanner: And so they have failed to pay, and you have denied that.

Mr. Cochran: Well, it is irrevelant and immaterial, but I have no objection.

The Court: It may be admitted and marked plaintiff's exhibit "D."

Mr. Tanner: All right. Now, Mr. Newton, did you at any time send to the defendants a statement of the rest of the Gillis account, other than the one just admitted in evidence?

A. Yes, that was included again.

Q. So that later you sent a complete statement?

A. Yes.

Q. Have you a copy with you?

A. I have a copy of the original bill.

Q. Is it a carbon copy? A. Yes, sir.

Q. And the original was sent to the defendants?

A. That is right.

Q. And it includes the \$52.30 you have shown?

A. No, this does not include that, no; it includes everything except that. [52]

Q. And this is an exact carbon copy of what you mailed the defendants? A. Yes, it is.

Mr. Tanner: We ask that this be marked for identification, Your Honor.



(Testimony of George Newton.)

The Court: It may be admitted and marked "Plaintiff's Exhibit E."

Mr. Tanner: Do you recall about the time Exhibit "E" was sent to the defendants?

A. I think it was the latter part of December, or January, in closing out the December books.

Mr. Tanner: I see. Now, Mr. Newton, were you employed and working with Mr. Gillis at the Masonic Hall at the time Mrs. Gillette came to interview Mr. Gillis relative to the work to be done?

A. Yes, sir.

Q. State, if you will, the conversation, if any, that you heard relative to this matter.

A. Well, as I remember, she came to the door of the Masonic Hall and asked to see the boss, and we called Mr. Gillis over and he talked to her, and I don't remember the exact words, but I know she asked him if——

Q. As near as you remember, state what took place, Mr. Newton.

A. Well, she asked him to do some work and he stated he was too busy.

Q. Mr. Newton, on or about the 16th day of December, 1946, were you present when a conversation took place between Mr. Gillis and Mrs. Gillette?      A. Yes.

Q. Where was that?

A. That was in front of the North Pole Bakery.

Q. And state what that conversation was, as near as you recall.

(Testimony of George Newton.)

A. Well, they met at the doorway, and we had just come from the Gillette job, and he asked her if she could get some more material to finish and she said, "No, just let the whole thing go."

Q. And she said, "No, just let the whole thing go"?

The Court: What date was this?

Mr. Cochran: December 16th, he said—Mr. Gillis said.

Mr. Tanner: You may cross-examine.

Cross-Examination

By Mr. Cochran:

Q. Now, Mr. Newton, you were up in the Masonic Temple Building when Mrs. Gillette came to see Mr. Gillis about moving her house; is that right?

A. Yes.

Q. You were working there?

A. That is right.

Q. What were you doing?

A. Putting celotex on the ceiling.

Q. What part of the building were you employed in at the time Mrs. Gillette came up there?

A. It was in the part that is the main hall now.

Q. The main lodge room?

A. That is right.

Q. And you were up at the ceiling, nailing some celotex and Mrs. Gillette came in—when she came in?

A. No, she did not come in.

Q. Where was she?

A. Standing outside the door.

(Testimony of George Newton.)

Q. That is quite some distance from the main hall, isn't it, Mr. Newton?

A. The doorway is right in front, and I [54] was right there—on some horses——

Q. And you stopped your work to hear what was said?  
A. No, I did not.

Q. What was Mr. Gillis doing at that time?

A. I don't know; he was inside working on something.

Q. What did Mrs. Gillette say when she spoke from outside?

A. She probably introduced herself, I suppose——

Q. And Gillis was working on something at that time and you were on horses; how far from him were you on the horses?

A. In a straight line, it would not be over 15 or 20 feet.

Q. And when Mrs. Gillette introduced herself?

A. Yes.

Q. And what did she say?

A. I don't remember word for word.

Q. And she just said she was Mrs. Gillette, did she?  
A. Something like that.

Q. Did you know her at that time?

A. No, I didn't.

Q. How long had you been working for Mr. Gillis?  
A. In Nome?

Q. That's right; how long?

A. I guess about two years; do you mean at

(Testimony of George Newton.)

that time? About one year then.

Q. Did you work for him other places than here?

A. Yes.

Q. Where? A. At the Base—not directly.

Q. You are not related to Mr. Gillis, are you?

A. No.

Q. Are you bookkeeper now?

A. Not altogether; just after working hours.

Q. Was anyone else there then?

A. Probably. There were others working with me. [55]

Q. Well, how did you happen to pay attention to what Mrs. Gillette was saying?

A. Well, I could not help but overhear.

Q. Did Mr. Gillis have an office in that building?

A. No, not there.

Q. He did not have any place where he kept his plans, etc.

A. Well, he kept his tools in a little shack outside.

Q. Now, did he go in there with Mrs. Gillette?

A. I don't know; he might have.

Q. Did you hear what was said in there?

A. No.

Q. Didn't he tell her to come into his office?

A. I don't remember. I remember she wanted him to do something and he said he was too busy then.

Q. And that is all you remember?

A. That's right.

(Testimony of George Newton.)

Q. You don't remember what she wanted him to do?  
A. Well, I understood it was the house.

Q. Did she say anything about moving the house?

A. Well, that is what they were talking about.

Q. What did they say about it?

A. Well, I just remember the instance——

Q. Well, Gillis said he couldn't do it, and that was all there was to it?  
A. No.

Q. What else did he say?

A. I cannot remember what he did say, but he did say he had lots of work and couldn't stop that.

Q. Then did they continue to talk?

A. I don't remember. [56]

Q. But you heard Gillis say he was too busy to move the house, is that right?

A. That is right.

Q. That is what he said?  
A. That is right.

Q. And what did Mrs. Gillette say then?

A. I don't know what she said, because I was busy.

Q. You were not interested in moving the house?

A. No.

Q. But she wanted to move the house from one side of the street to the other?

A. I don't know where she wanted it moved to.

Q. And was that all you heard of the conversation?  
A. I think so.

Q. And that would be that Mrs. Gillette introduced herself and said she wanted to have the house moved?  
A. Yes.

(Testimony of George Newton.)

Q. And you did not hear anything else?

A. No.

Q. Did Mrs. Gillette go out then?

A. I don't know.

Q. That is all.

The Court (to C. C. Tanner): Any further questions?

Mr. Tanner: That is all.

Mr. Cochran: One moment—you say on the 16th day of December, 1946, you were walking down Front Street with Mr. Gillis?

A. No, I did not say that.

Q. What did you say?

A. I did not say how we got there, but we did drive around in a truck.

Q. From the Gillis Shop?

A. To the North Pole Bakery. I went with him on the way to the shop, for him to see if there was any material there. [57]

Q. Did you take the tools away?

A. We did, but I did not go for that purpose.

Q. Well, you drove up from Mr. Gillis' place to the North Pole Bakery, and did Mr. Gillis have tools in his truck? A. I don't know.

Q. Well, you had been there, hadn't you?

A. We did not pick up any tools there.

Q. What did you go there for?

A. Well, we were looking for some material.

Q. Did you see lumber lying around there?

A. I don't know.

(Testimony of George Newton.)

Q. You knew you were going down to look for material; didn't you know what material you were looking for? A. I did not, no.

Q. Well, you were driving down the street in the truck with Mr. Gillis; did you stop to see Mrs. Gillette? A. We stopped for a cup of coffee.

Q. And you met her at the North Pole; what did she say?

A. Well, we stopped and asked if she could get some material—I don't remember what she said——

Q. You were employed at the time?

A. Yes, sir.

Q. Didn't you know what material he was talking about? A. Not necessarily.

Q. What material did you take it to be that he was looking for?

Mr. Tanner: Well, if the Court please, I think that is uncalled for——

Mr. Cochran: I am trying my best to find out what kind of [58] material he was looking for. Was anyone else there?

A. Well, I just know she was going in.

Q. Was she mad?

A. No one else was with her. I don't know whether she was mad or not.

Mr. Cochran: Well, that is all.

Mr. Tanner: Plaintiff rests, Your Honor.

Mr. Cochran: Mrs. Gillette, please.



witness sworn.

MRS. IRENE GILLETTE

Direct Examination

By Mr. Cochran:

Q. Mrs. Gillette, your name is Irene Gillette, one of the defendants in this case? A. Yes.

Q. Do you know the boy, George Newton, who testified here?

A. I never saw him before in my life. I did not know who he was.

Q. Mrs. Gillette, did you meet Mr. Gillis in front of the North Pole Bakery in the presence of this boy Newton? A. I never saw the boy before.

Q. Well, in the presence of this boy, on the 16th day of December, 1946, or at any other time, did you tell Mr. Gillis in substance to stop work on the moving of your building across the street?

A. Indeed I never did; I never told him to stop work.

Q. Did you after that time talk to Mr. Gillis or speak to him about completing the job?

A. Yes, sir, I talked to him in the North Pole Bakery. I would say it was approximately two weeks before the 20th of January, because I was going to have a party for a friend's birthday. Mr. Gillis was having coffee at the counter and I walked over [59] and said, "When will you get us into our house"? He said, "I am going to get to it right away." He said as long as the basement is frozen, we cannot finish. I said, "You will never thaw the basement in a million years." Then he said, "I

(Testimony of Mrs. Irene Gillette.)

never wanted to do that job anyway," and I said, "We are very well aware of that, and we don't appreciate letting the work go and going to work for Mr. Jackson after storm."

Q. Was that after the 16th day of January?

A. Yes, somewhere before the 20th, but after the first of the year, because I had that party in mind.

Q. Now, you owned this building on the south side of Front Street, and you own it now, where it is presently located? A. That is right.

Q. When did you negotiate with Mr. Gillis with reference to moving this building?

A. On approximately the 8th of August. I presume it might have been a couple of days before.

Q. Where was he when you saw him?

A. I went to the Masonic Temple and there were a lot of men working there, and I asked for Mr. Gillis and told him I wanted to see him about doing some work; and he said, "Come in my office," and I had no conversation with him whatever in the Masonic Temple or at the door. He did not know at that time what it was I wanted done. I asked him if he could do some work and he said he was very busy and did not know how he could do it; and I said, "Since Ben just came out of the hospital"—[60] well, I rather coaxed him to do it and he didn't say he wouldn't. He said, "I'll take this sketch and give you a cost on it," but we were not interested in the cost, and wanted the house taken care of; and I said, "You have been recommended

(Testimony of Mrs. Irene Gillette.)

to us and I don't think I need any figures." But he said, "We always insist on doing that," and I said, "OK." In a day or two—I don't remember where I was, he brought back my sketch and brought back figures, and gave it as exhibited there.

Q. I hand you Exhibit No. 1 and ask if that is all Mr. Gillis gave you?

A. That is absolutely all.

Q. Does that embody the things he was to do?

A. That is the way we understood it.

Q. And the price? A. That is the price.

Q. I hand you defendant's Exhibit for identification, Exhibit No. 2, and ask you to examine it and state whether or not that is the plat that you refer to as having given to Mr. Gillis when you first saw him? A. That is right, it is.

Q. And on the subsequent day, did—when he gave you Exhibit One, did he return to you this plat? A. That is right, he did.

Q. Had that been changed in any way?

A. Not a bit.

Mr. Cochran: Now, I intended to have a larger plat of this made, Your Honor. However—now, Mrs. Gillette, will you just show the Court what additions on this plat—what was to be put on the building?

The Court: I think I understand it. [61]

Mr. Tanner: Frankly, we would like to see that too.

(Defendant pointed out to Court the work that was to have been done.)

(Testimony of Mrs. Irene Gillette.)

Mr. Cochran: Did he build the addition on the west end?           A. No.

Q. And that extended the full width of the house?           A. That is right.

Q. Is that what is referred to in the memorandum that he gave you, "to complete the addition as shown"?           A. I would say so.

Q. And that was not completed at all?

A. No, sir.

Q. And nothing was done on it?           A. No.

Q. Why?

A. Because I told him we were not ready to do it yet. He came down to ask us if we were going to let him do our work and I said yes, but we were not going to put on the 8x30 part; we just wanted the 7x17 porch made into a dining room. We did not say anything about reducing the price at that time.

Q. Did the price of \$2872.28—did that include building this 30 foot addition?           A. Sure.

Q. And you told him he need not build that?

A. That's right.

Q. Now, what did he build onto the building?

A. He enclosed one wall, 17 feet. He finished the end of that porch, 7 feet, by roughing it in, and put the asbestos shingles on, and the black celotex was partly on inside. It was never finished. Mr. Metrovich had to put some on when they were trying to warm the place up. There was a rough floor put in, and there was the beginning of a [62] partition because he understood the stairway was to go from

(Testimony of Mrs. Irene Gillette.)

the hall space; they were to be put in exactly as they were, and I believe—I cannot recall anything else—the windows were to be in—when we did not put the back piece on, those windows and doors were put on.

Q. It was specified that no interior work on the whole house was to be done? A. That is right.

Q. And no plumbing? A. That is right.

Q. And no wiring? A. That is right, no wiring.

Q. And all material furnished by you?

A. Yes. He came to us several times to ask if it was all right for him to buy it, and we said it was OK.

Q. Now, Mrs. Gillette, this states moving operations are to be completed in October. Were you definite about the time it was to be completed?

A. Well, we know the storms occur in October, and he put that on himself, and he put that in of his own free will.

Q. Did you make any specification about when it was to be completed?

A. I wanted it by the end of October, when we talked about putting on the 8x30 piece and he said he would not be able to complete that until the—next spring, and I said it was OK. He could not finish the interior, he did not have time, and would have to leave that perhaps.

Q. Did he complete this dining room that he started? A. I should say not.

(Testimony of Mrs. Irene Gillette.)

Q. What did he neglect to complete?

A. Well, there was [63] so much that wasn't done. One thing in particular that was important—I don't know what you call it, the siding from the roof to the main part of the building, and we had so much snow and ice, we had to take it off and fix it over. The snow and ice piled in there thick.

Q. Now, go on and tell us in detail just what he did in connection with the completion of the moving of the building. Was he to restore the building and make it ready for occupancy?

A. Well, I would say so; it was not any good to us the way it was—no steps to go into. The basement was frozen up so we could not—

Q. Did you have to employ Duke Metrovich to install the plumbing?

A. Oh, yes; that was agreed upon.

Q. Now, when did they start to move this building from the south side of Front Street to the other side of the street?

A. On the 14th day of October, he came in and took the stairs out that had been temporarily put in, and on the 15th, about 8 o'clock in the morning, they came and told us we would have to get out. On the morning of the 15th we were eating breakfast and they dashed in and told us we would have to get out and that they were going to move the house. And so we went to the hotel.

Q. How long did he tell you it would take to move the house?      A. He did not tell me.

Q. About what distance did he have to move it?



(Testimony of Mrs. Irene Gillette.)

A. Well, Front Street is 90 feet wide, and we are setting back about—when they straighten that corner out, we should be about [64] 30 feet off of Front Street. That is approximately 120 feet—I don't know much about measurements.

Q. Would you say about 200 feet, Mrs. Gillette?

Mr. Tanner: Well, if the Court please, these direct leading questions—I wish counsel would confine himself to the testimony of the witness.

Mr. Cochran: I did not think I was doing that——

The Court: Yes, you put the 200 feet in, Mr. Cochran.

Mr. Cochran: Oh yes, I did do that, Your Honor.

The Court: Well, we will recess for ten minutes.

Mr. Cochran: Did you ever have any other understanding with Mr. Gillis, with reference to the moving of your house other than is stated in this memoranda which he gave you under date of August 8, 1946?

A. Do you mean—any other agreement or understanding?

Q. Yes. Did you ever have any other understanding with Mr. Gillis about the moving of the house?      A. No.

Q. It is admitted that you paid to Mr. Gillis on this agreement the sum of \$1000.00, isn't it?

A. That is right.

Q. When was that paid?

A. On October 10th.



(Testimony of Mrs. Irene Gillette.)

Mr. Tanner: Pardon me, Your Honor, apparently the question is again misleading. Counsel has stated that it was admitted that \$1000.00 was paid on this agreement. Now, that is not correct, Your Honor, as far as this being admitted——

The Court: State your question again——

Mr. Cochran: Have you paid anything on this agreement to Mr. Gillis?      A. Yes. [65]

Q. What amount was that?

A. \$1000.00 paid through the bank on October 10th. The check is dated October 10th.

Q. Now, when did the plaintiff, Mr. Gillis move your house onto its present location?

A. Do you mean when he started or when he finished?

Q. When he moved it.

A. Approximately November 12th, because that was when the furnace was put in and that was done as soon as the building was on the foundation and it could be done.

Q. Were you deprived of the use of your house after he told you to leave?      A. Oh, sure.

Q. And what was the condition of the weather at the time he moved this building onto its present foundation?      A. Well, it was pretty cold.

Q. Was it freezing?      A. Oh, sure.

Q. How long had it been freezing?

A. Well, quite a while. It was cold weather when we left the house on the 14th of October.

Q. Was there any reason, so far as you were able to determine, why or any reason for not having

(Testimony of Mrs. Irene Gillette.)

moved this house in the month of October?

Mr. Tanner: Just a minute, Your Honor——

The Court: You need not answer that.

Mr. Cochran: All right. Did you make any alterations in your agreement which would provide for the moving of this house later in November?

A. No. [66]

Q. Was it essential to you that the house should be moved in October?      A. I should say so.

Mr. Tanner: Just a minute, Your Honor, these continual leading questions—I don't like that——

Mr. Cochran: A leading question, Your Honor, is whether the answer is "yes" or "no," and this does not suggest an answer. The definition of a leading question is very clear.

The Court: Proceed.

Mr. Cochran: Now, were there braces underneath your building in its location on the south side of Front Street?      A. Yes, sir.

Q. How many, do you know?

A. I don't know.

Q. More than one?

A. Oh, yes, more than one.

Q. Is there a chimney in your house?

A. Yes, sir.

Q. What is that?

A. Cement, concrete blocks.

Q. And what was the condition of that before it was moved?

A. It was OK, as far as we knew.

Q. Had it been inspected?      A. Yes, it had.

(Testimony of Mrs. Irene Gillette.)

Q. Had there been any adverse report on it?

A. No.

Q. What was the condition of that after the house moved?

A. Well, I would say it was pretty bad. It was condemned by Chief Brown when he came down to look at it.

Q. Was it necessary to make any repairs on that?

A. Absolutely.

Q. Who made those repairs?

A. Mr. Gillette. [67]

Q. Did you have to buy concrete blocks for it?

A. Yes, we did.

Q. How much did you have to expend for those?

A. Well, I have the bill here. I think we bought seven, or Mr. Gillis bought seven and we bought five. I will have to see my bill. It is kind of hard to remember—we got five chimney blocks from Larry Galvin.

Q. How much did you pay for them?

A. The total bill is \$14.75.

Q. Why was it necessary to get those blocks, Mrs. Gillette?

A. Well, the whole top of the chimney was gone and underneath there was a big hole next to the roof—like this——

Q. Now, after Mr. Gillis moved your place onto its present foundation, what was its condition as to being level?

A. It had sagged five inches.

Q. What was the condition of the doors?

(Testimony of Mrs. Irene Gillette.)

A. They were in such a condition that we could not get in.

Q. Was it necessary then to have posts put under there?      A. It was, yes.

Q. Was Mr. Gillis requested to do that?

A. Well, Mr. Gillette went up to see him and tell him the floor had sagged.

Q. Did you have to employ someone to put them in?

Mr. Tanner: Just a moment, these questions are leading—they suggest an answer.

Mr. Cochran: Did you employ someone to put them in?

Court: Ask generally what had to be done, Mr. Cochran. [68]

Q. All right. What has been done, if anything, with reference to putting the braces under the house after moving it?

A. We employed Mr. Satterlee to put five posts under the house.

Q. And what did you have to pay for that?

A. That was \$190.00. He did some other things along with that, like chinking up the outside, because there was no skirting on between the house and the foundation. He also put the window in the basement; there had been a gunny sack over that.

Q. Who put that on?

A. Mr. Gillette; and I asked them if they would not board it up. It was never done and I finally got Mr. Metrovich to board it up. The original

(Testimony of Mrs. Irene Gillette.)

window from the old house basement was to go in there, but was never put in.

Q. And what amount did you say you had to pay for that work?

A. Well, Mr. Satterlee's bill was \$170.00 plus \$38.50. The \$38.50 had nothing to do with the contract—whatever it states in there.

Q. Well, what was it you paid for that work?

A. All right, just a minute, and I will tell you; \$175.00 in one check and \$17.00 in the other. That was the two amounts for fixing the window—fixing the window, putting the posts under and leveling the house.

Q. Now, did you do anything with reference to the basement?

A. I don't quite know what you mean.

Q. In the construction of the basement; did you have it dug?

A. Yes. [69]

Q. Who did that?

A. Mr. Bronson did some; Eric Nelson did some.

Q. Did you do anything toward drainage or sumps?

A. Yes, we had Mr. Hoop put a barrel in there.

Q. And what happened to that sump?

A. It was filled in.

Q. Who filled it in?

A. Whoever put the backfill in that Mr. Gillis had down there.

Q. State whether or not it was usable after it had been filled in, Mrs. Gillette.

(Testimony of Mrs. Irene Gillette.)

A. No, we had to dig a new one.

Q. And what was the cost of that? The original thawing of the sump was \$39.00 and—I will have to get my check here—\$39.75, I believe—I will get it right here——

The Court: I think we will recess this until 10 o'clock tomorrow morning.

On the 27th day of December, 1947, the following took place:

The Court: Yesterday, when we finished, you had Mrs. Gillette on the stand. I presume you are not finished yet.

Mr. Cochran: No, Your Honor, we were talking yesterday about the waterproofing of the outside of the concrete wall. Now, did you—what did you do—did you do anything with reference to having the outside of the basement waterproofed?

A. I spoke to Mr. Gillis and said that we would like to have it waterproofed—that we would have a man from Nome Motors, and he said, “If you do, it will hold us up putting in the floor of the basement—better [70] not do it.

Q. Did you have the waterproofing?

A. We had the paint and it froze through the winter and he never did use it. It would hold him up, he said.

The Court: What is this backfill that you are talking about? Is it the filling up around the concrete wall?



(Testimony of Mrs. Irene Gillette.)

A. Yes, sir.

The Court: It was bringing the lot up to a level?

A. Yes, sir.

Mr. Cochran: Was that in the basement or on the outside? A. It was on the outside.

Q. Now, Mrs. Gillette, going back to the time that you were given this statement of Mr. Gillis, on the 8th day of August, was—when was that given to you?

A. Approximately a day or so after it was dated, which I don't know if it was the same day or the next day—three or four days from the time I talked to him anyway.

Q. Where did he give it to you?

A. It was in the Nome Motors office.

Q. What did he give you at that time?

A. He handed me the contract and the plan.

Q. Had that original plat or plan that has been offered in evidence—had that been altered or changed in any way? A. No.

Q. Had you discussed that thoroughly with him before it was given to you?

A. I would not say "thoroughly."

Q. Just what did you discuss with him, Mrs. Gillette, as to what was to be done?

A. Well, I did not discuss it a [71] great deal. It was marked quite plainly and we told him that was what we wanted done.

Q. I believe you testified that Mr. Gillis came subsequently and asked about the work, did you,



(Testimony of Mrs. Irene Gillette.)

Mrs. Gillette?

A. He came two or three days later and said, "Did you folks decide to let me do your work?"

Q. Was Ben there? A. Yes, he was there.

Q. Had you shown it to him?

A. Yes, I had, and talked it over.

Q. He did not come inside?

A. Just pokèd his head in the front door.

Q. What did you and Ben say about his going ahead?

A. We said yes, but we were not going to have the 30x8 built on. The plat showed what we were not going to have done. We did not discuss the price and thought we would never have any trouble with the contract.

Q. What did Mr. Gillis say with reference to the addition to be put on, the 8x30?

A. He did say, when he handed me this plan back and the contract, he said he might not be able to do the inside finishing on the 8x30 until spring. That was the main reason why we did not have it done, because we thought we would be torn up probably through the cold weather or something.

Q. What was the date when Mr. Gillis asked you to get out of the house?

A. It was the morning of the 15th of October.

Q. And when you were able to move back into your house? [72]

A. The 15th day of February.

Q. Were you able to get back into the house before that time?

(Testimony of Mrs. Irene Gillette.)

A. We got in there and got some clothes.

Q. No, I mean back to live in the house.

A. No.

Q. Then you could not live in the house from the 15th day of October, 1946, until the 15th day of February, 1947?

A. The records at the Paterson Hotel will show what date we went in and when we left there.

Q. You are positive of the dates.

A. Yes, I have my cancelled checks.

Q. I believe you stated it was the 12th of November when he moved this building?

A. Apparently, according to Mr. Metrovich's bill to us which is itemized; he said on the 12th of November, he connected up the furnace. He was standing around waiting to put the stuff back into the house—I have no other way of knowing exactly the date.

Q. Now, this cement basement that you had to complete, what had to be done—what was the condition of the basement; the floor of the basement?

A. It was full of ice.

Q. How long were you thawing on that, Mrs. Gillette?

A. Mr. Gillette started in when we got into the house on the 15th of February and thawed for at least four months. He kept water on it and picked there with a pick.

Q. Was that thawed up until the freezing weather last fall?

A. Yes, sure. They put on the backfill, that

(Testimony of Mrs. Irene Gillette.)

was thawed; at least the top part of it. [73]

Q. Now, we talked about the braces yesterday. You testified about having Mr. Satterlee brace the house; it had sagged five inches?

A. Yes, that's right.

Q. Could you open the doors? A. No.

Q. You said you would get together the receipts for payment for the bracing of the house—Mr. Satterlee you said did that? A. Yes, he did.

Q. Have you the receipt for the amount you paid him for that work?

A. I have my cancelled check. I have two cancelled checks; he did two jobs. I have one check for \$175.00 and one for \$17.00; \$15.00 of that was putting in the basement windows; \$175.00 was for the braces and taking off the ice and snow from the roof on the addition.

Q. What was the total amount you paid?

A. \$190.00 we entered.

Q. Are there \$2.00 there we overlooked?

A. The check for \$17.00—\$15.00 in here and probably \$2.00 for something else.

Q. Did this pay for that work? A. Yes.

Mr. Tanner: What work?

A. Taking ice and snow off of the roof, raising the house the five inches it sagged and putting in the basement window that was left out with a gunny sack over it. I think he also finished the partition there that was started and never finished.

Mr. Tanner: In other words, completing the house?

(Testimony of Mrs. Irene Gillette.)

A. Well, we had some more done after that, Mr. Tanner. [74]

Mr. Tanner: Well, that was putting in braces to keep it from sagging?

A. To keep it from sagging again.

Mr. Tanner: Well, what proportion of that was for that?

A. Well, here is a bill here. He had to dig through that ice and frost to put that tank in, and it was because the basement was frozen that he had to do that. We figured that was logical—a charge against the people who let the basement freeze.

Mr. Tanner: Well, in your Answer you have set forth a certain sum for completion or bracing of the house that sagged—what does this represent relative to the sagging?

A. Well, he said that, and he had to brace the stairs up. He has 47 hours charged on that at \$1.75 an hour.

Mr. Tanner: You have made no allegations about the stairs, have you? Now, I want to know the amount you paid for the damage due to the house sinking?

Mr. Cochran: The house sinking?

Mr. Tanner: Yes. I object, Your Honor; they do not show the true amount paid.

The Court: Your answer states that you were advised, by reason of the fact that the residence was left unbraced and that it sagged in the middle and that the doors of the building would not open, the defendants were compelled to have it raised for which \$190.00 was expended. Now, the testi-

(Testimony of Mrs. Irene Gillette.)

mony is that the \$190.00 covered other things.

Mr. Cochran: What it covered—well it covered the fixing of [75] the window in the basement, but as far as the actual payments are concerned and the posts, I would consider having to re-brace part of that too, because it was the house sagging—it was because of that that the stairs had to be taken care of.

The Court: Well, that doesn't indicate——

Mrs. Gillette (Defendant): Well it says here in the memorandum, beams and posts, 47 hours at \$1.75 an hour. It is true that that does include some other things, but it was on account of that we had to have it done—18 hours for the stairway.

Mr. Cochran: Has this been paid?

A. That is part of the check here—this \$175.00 check.

Q. This was for \$175.00——

A. Well, it was for the septic tank and putting the window in for those 35 hours.

Q. Well, I will call Mr. Satterlee on that. Now, was there a sump prepared in this basement?

A. Yes, there was.

Q. Explain what that was.

A. We had Mr. Hoop come with his equipment and thaw several holes there and then they put down this barrel, a big tank, to use, and the drain was under where he thawed out.

Q. What happened to that?

A. That was filled in.

Q. By whom?

A. By Mr. Gillis.

(Testimony of Mrs. Irene Gillette.)

Q. What did you have to do subsequently?

A. We had to dig a new sump. [76]

Q. And what was the cost of digging that?

A. The original cost of Mr. Hoop's bill was \$39.75.

Q. Did you pay that?

A. I have the cancelled check for that.

Q. You paid that, did you? A. Yes, sir.

Q. And you have the cancelled check for it?

A. Yes, I do.

Q. Now, I think you testified that the condition of the basement as having been frozen; was the plumbing damaged by reason of its freezing?

A. Yes, according to Mr. Metrovich's bill, it was.

Q. Just—was it damaged?

A. According to Mr. Metrovich's bill he sent in—I could not swear to that, but according to the bill it was, and we paid him for repairing it. He says here, "Repairing plumbing."

Q. That was Duke Metrovich? A. Yes.

Q. How much did you have to pay for that?

Mr. Tanner: Just a minute, Your Honor, they are trying to establish this as being the fault of the plaintiff—what was paid makes no difference unless they can identify it.

Mr. Cochran: It has already been testified that the basement was frozen up by reason of this man's delay, and this damage in particular is by reason of the freezing of the plumbing in the place on ac-



(Testimony of Mrs. Irene Gillette.)

count of its not having been done within a reasonable time.

Mr. Tanner: From whose testimony?

The Court: She has already testified that she cannot testify to it——

Mr. Cochran: Mrs. Gillette, the—what expense, if any, did [77] you have in repairing the chimney in this building?

A. Well, we bought five concrete blocks. We are charged with seven by Mr. Gillis in his bill.

Q. Well, I don't care anything about that——

A. Well, there was a cost—we bought five blocks and it took Ben approximately 32 hours to repair it.

Q. 32 hours? And what was the cost of that?

A. The five we bought cost \$14.75. The seven Mr. Gillis is trying to collect for is \$20.65.

Mr. Tanner: Just a minute, Your Honor, trying to bring in other stuff relative to bills and what they have expended—let's stay on one item——

Mr. Cochran: I am on paragraph 12 of the Answer, just as alleged——

Mr. Tanner: Well, let's not have the witness bring in what they are charged for.

Mr. Cochran: Mr. Gillis has us charged with items for the chimney which was condemned by the fire chief. It was in good condition when it was moved.

Mr. Tanner: And it has not been paid——

Mr. Cochran: It was through his negligence that the chimney had to be repaired. He has charged for blocks used on the chimney destroyed by his own



(Testimony of Mrs. Irene Gillette.)

negligence and he should not be able to charge us with any blocks that he bought for that, which was made necessary by his own negligence.

The Court: I take it that both the five blocks and the seven blocks were secured after the moving of the house? [78]

Mr. Cochran: I presume so, Your Honor. Mr. Gillis claims he put in seven blocks himself.

The Court: It is charged in the moving of the house?

Mr. Cochran: Yes, that is right, Your Honor.

The Court: Well, why are you putting in evidence?

Mr. Cochran: Well, he is charging us with seven more.

The Court: They have not been paid for. You are asking for repair of furnace and that has not been paid for; therefore, you cannot ask \$100.00 for them.

Mr. Cochran: Yes, Your Honor—I will probably ask more——

The Court: You are asking \$100.00?

Mr. Cochran: That is true, and I am attempting to prove it.

The Court: You cannot prove something you have not paid.

Mr. Cochran: She already testified that it was 37 hours.

The Court: Objection will be sustained. Proceed with your examination.

Mr. Cochran: Now, the completion of the dining room—did you have to have that completed?

(Testimony of Mrs. Irene Gillette.)

A. Yes, sir.

Q. Mr. Gillis did not complete it?

A. No, sir, he did not.

Q. Who did the work?           A. Mr. Margraf.

Q. And what was paid for that?

A. \$260.00.

Q. You paid him that amount?

A. Yes, \$260.00.

Q. That is item 13. Now, did Mr. Gillis take a pump away?           A. Yes, he did.

Q. What was that pump?

A. It was a Burk's pressure pump.

Q. Has that ever been returned?

A. No, it never has. [79] Tony asked for it—I don't know his other name.

Q. Was he in charge of the work there?

A. He was working there. He said he needed it somewhere else and it would help him.

Q. Do you know what that pump cost?

A. Approximately \$150.00. We cannot find our bill because the storm washed the bills out of the basement.

Q. Now, the corner that was cut off of the cornice of this building—has that ever been repaired?

A. No, it has not.

Q. As to the cutting of that off—did you authorize Mr. Gillis to cut that off?

A. I did not.

Q. Did you know anything about it?

A. No, he came into the office——

(Testimony of Mrs. Irene Gillette.)

Q. Did Mr. Gillis have any conversation with you with reference to that?

A. Well, he came to the office——

Q. What do you mean by “the office”?

A. The Nome Motor Company office, and he said, “We have got to cut the corner off the cornice,” and I said, “Why don’t you have the telegraph poles removed”?’; but when I came back, the corner was cut off.

Q. Did he have the telegraph poles moved?

A. He did.

Q. What do you estimate the cost of repairing the cornice that he took off?

A. I would say \$100.00.

Q. That has been repaired?                      A. No.

Q. Now, what is the condition of the walls of the basement at this time?

A. They are cracked in various places—the water seeps through whenever it is thawed. [80]

Q. Mrs. Gillette, you were kept out of your house from the 15th day of October until the 15th day of January?

A. No, until the 15th day of February.

Q. February? Did you have to incur any expenses by reason of having been kept out of your home during that period?

A. We not only had to live at the hotel, but had to keep a fire in the furnace at the house. We had a big oil bill, the lights were on all night, and we had to pay a hotel bill of \$410.00—I have my checks for that—and we had to eat at the North Pole Bakery.

(Testimony of Mrs. Irene Gillette.)

Q. And expenses for your meals — about how much for that?      A. \$412.00.

Q. Now, Mrs. Gillette, was that more than it would have cost you to live at home?

A. Very much more, yes.

Q. Approximately what percentage more?

A. Well, our lights and heat were an additional expense too——

Q. No, I am speaking of your board.

A. Well, it is a little hard to estimate that, but anyone who eats at the North Pole knows that it costs at least as much as at home, I would say at least twice as much.

Mr. Cochran: You may cross-examine. No, just a moment—was there anything else?

A. Well, I don't think so.

Mr. Cochran: All right, you may cross-examine.

The Court: Just a minute—one of these exhibits has not been introduced as evidence. It has been introduced for the purpose of identification only. [81]

Mr. Cochran: I think I introduced them in evidence, Your Honor. Well, it has been offered for identification and I ask now that it be introduced in evidence.

Mr. Tanner: Let me see it, will you?

Mr. Cochran: I can give you a copy of it, if you wish it, Mr. Tanner.

Mr. Tanner: Well, we won't object to it, Your Honor.

The Court: It may be entered as evidence and marked "Defendants' Exhibit 2."

(Testimony of Mrs. Irene Gillette.)

Cross-Examination

By Mr. Tanner:

Mr. Cochran: Pardon me a moment, I am not positive that you testified about the conversation in front of the North Pole Bakery.

Mr. Tanner: That was testified to——

Mr. Tanner: Mrs. Gillette, during the storm of '45, of course your building was placed in a kind of precarious position, wasn't it?

A. Well, the bulkhead was washed out——

Q. Well, it placed it in a bad condition, didn't it—damaged possibly?      A. Sure.

Q. And that was your reason for being very anxious to get it moved?

A. Of course; that is right.

Q. Now, prior to seeing Mr. Gillis, you had had Mr. Green working on it, had you?

A. That is right.

Q. And that was when you had part of your basement dug out?      A. Yes.

Q. And he had gotten quite a bit of lumber? [82]

A. He had ordered 6400 and some feet of lumber.

Q. Yes. Why didn't Mr. Green continue with the work?

A. He said he could not get the work done properly. His best man was on a long drunk and he said he did not see how he was going to be able to do it.

Q. And he said he would gladly pay you for any damages that may have been caused?

(Testimony of Mrs. Irene Gillette.)

A. Yes——

Q. You did not have any contract with him to do the work? A. We did not, no.

Q. Then after that, you go and see Mr. Gillis?

A. That is right.

Q. And upon recommendation of friends, and so on, as to his reputation? A. Yes.

Q. In other words, he had a good reputation?

A. One man had told us so.

Q. In other words, as far as you could learn, he had a good reputation?

A. Well, I would rather not go into that.

Q. Well, didn't you say that?

A. This one man told us that.

Q. Now, Mrs. Gillette, when you go to see Mr. Gillis the first time, he is in the Masonic Building?

A. Yes.

Q. And you speak to him at the door first?

A. I asked for him.

Q. And introduced yourself at the door, is that right? A. Yes.

Q. And in your first conversation with Mr. Gillis, he objected to the work on the ground that he could not do it? A. Yes, he said he was too busy.

Q. And then of course you were very anxious that it be done, weren't you? A. That is right.

Q. And so, in a sense, you put up an argument for him to do it?

A. Well, that is a natural thing, isn't it?

Q. But you were very anxious to have the work done under the circumstances?



(Testimony of Mrs. Irene Gillette.)

A. Yes, that is right.

Q. And so you went into his shop then to discuss the matter?      A. That is right.

Q. And you state that you had this little plan?

A. Yes, I did; otherwise he would not know what to tell me.

Q. Well, that was not a very good plan, was it?

A. It was as good as I could do.

Q. Prior to that time, you had given it to Mr. Green?

A. No, Mr. Green talked us into selling that house and getting a new one.

Q. And you were going to build a new home at that time?      A. Well, if we had sold this one.

Q. At any rate, Mrs. Gillette, you only considered this a rough sketch as to how you thought you would improve the old building?

A. Well, it looks rough, but it is very definite and the house shows it now, finally, with that little porch enclosed.

Q. Well, have you a bill of particulars as to just what kind of material was to be used?

A. No, we do not.

Q. In other words, that was to be left to your instructions?

A. I don't know that anything was said about it—you don't [84] have a room built on with a bunch of holes in it——

Q. Well, Mrs. Gillette, there are a lot of ways to build an addition.

A. Well, we agreed to furnish the material.



(Testimony of Mrs. Irene Gillette.)

Q. Then, there was nothing discussed with Mr. Gillis relative to the kind of materials that would go into the building? A. No, there was not.

Q. In other words, that was left to your instructions? A. On the contract it says so.

Q. And you were assuming it was a contract?

A. It was, as far as I was concerned.

Q. So you had no details on the matter, except this little sketch of yours? A. That is right.

Q. And at the time when Mr. Gillis told you he was tied up with work and that he could not see his way clear to do it, you told him, of course, that you had the materials and would furnish them, didn't you?

A. Well, I did not know what we needed myself—I changed my mind several times.

Q. But you did know, however, that you wanted the building moved and a general idea of what you wanted done?

A. Well, it was right there on that sketch what I wanted.

Q. Now, Mrs. Gillette, after outlining the work that you anticipated and wanted done in the emergency, didn't you ask Mr. Gillis what he thought the approximate cost of that would be?

A. No, I was too anxious to have the work done.

Mr. Tanner: Now, Mrs. Gillette—— [85]

The Court: Now, please don't argue back and forth——

Mr. Tanner: Well—so you said you did not ask for any estimate at all?

(Testimony of Mrs. Irene Gillette.)

A. I did not, Mr. Tanner—I have already testified to that.

Mr. Tanner: Nor did you ask for a contract?

A. No, sir, I did not.

Q. Under your ideas, and so on, Mr. Gillis was to have nothing to do with the plumbing, was he?

A. No, sir.

Q. And I understood you to say that Mr. Gillis did not tell you how long it would take to move the building?

A. It says on the exhibit there that it would be——

Q. I said, did he tell you—and I will ask you if this is true, you said he did not tell you how long it would take?

Mr. Cochran: I object to that. He put it that she did testify. That is assuming something that is not true.——

The Court: Well, don't argue about it——

Mr. Tanner: All right. Did you or didn't you state on your direct examination that Mr. Gillis did not tell you how long it would take to move the house?

A. Well, he did not tell me. He did not discuss this except what he wrote on that paper—on the exhibit.

Q. All right. Now, Mrs. Gillette, when, prior to the moving of the building from the original location on the beach side, prior to that building being moved into the street from its original location,

(Testimony of Mrs. Irene Gillette.)

when did you have the chimney examined?

A. I do not know; whenever the fire chief did it. We did not ask him to. [86]

Q. You don't recall when it would be?

A. No, I don't.

Q. Now, when did you first learn that the building had sagged on its new foundation?

A. Mr. Metrovich came to me and said, "You better do something about your house; I don't think Mr. Gillis is going to finish it and it's beginning to sag."

Q. When was that?

A. Well, I will tie it in with something; he said, "You better do something about it"; I cannot tell you exactly the date.

Q. Well, I want to know about the time——

A. Well, it was a couple of days, because I came home and——

The Court: Can you place that date? That is the question.

A. Well, it is a matter of trying to remember. We estimate that he went up there the latter part of January, or somewhere in there.

Q. And it would be just a short time before that?

A. No, he went right away when we knew he wasn't going to finish it or had not even mentioned it.

Q. Your basement is frozen ground?

A. No, it isn't.

Q. I understood you to say you had Mr. Hoop thaw out a sump.

(Testimony of Mrs. Irene Gillette.)

A. That was below the house; well, that portion is frozen ground.

The Court: Is that west of the present house?

A. It is south.

Mr. Tanner: Near the beach?

A. Well, it is toward the beach.

Q. Now, calling your attention, Mrs. Gillette, to your statement that you could not go into the house until February 15th, [87] am I correct in stating that you testified on direct examination that you had a party in your house on January 20?

A. No. That was why I spoke to Mr. Gillis and I said I wanted to have a birthday party there, and that I wanted to get into the house for Christmas and New Years, and then that I wanted to have this birthday party particularly. I did not say I had one; I said I wanted to have one.

Q. Now, of the work that was done by Mr. Gillis—not what was not done, but I am referring to the work that was done, will you state for us, please, the work that you considered was done in an unskillful and unworkmanlike manner?

A. Well, the way I look at it now, I don't feel that any of it was done right—it was not finished.

Q. Well, Mrs. Gillette, I am speaking of the work that was done please.

A. Well, I would not be able to say on the forms that he fixed up—I do not know. I know the cement walls are a very bum job.

Q. In what respect?

(Testimony of Mrs. Irene Gillette.)

A. There is no finish to it. It is very poorly done. We have done as much with it as we could. The stairway is a joke——

Q. How should it be done?

A. I don't know but that it should look like some of these other places that have been done—I know the stairway is a joke certainly.

Q. Was that finished?

A. No, sir, it was not.

Q. Now, I am speaking of the work that was done, Mrs. Gillette——

A. Well, there was nothing finished. I will say the three windows that were put in are good. [88]

Q. They were finished, were they?

A. Yes, and the door casing that was put on. Outside of that, nothing was finished.

Q. So that your main objection is that the work was not finished?      A. That is right.

Q. And you feel that the damages have resulted, not from the work that was done, but that which was not done?

A. Well, if you could call letting the basement freeze because the work wasn't done, that is right.

Q. Now, speaking of the sump, Mrs. Gillette, tell us a little more about that—just what purpose the sump was fulfilling and what was done.

A. Well, it was filled in so we could not use it. That was to be used for the overflow for the septic tank.

Q. It was not drained from the basement?

(Testimony of Mrs. Irene Gillette.)

A. No. It was to be the overflow.

Q. You, of course, were to have the basement ready for the cement?      A. That's right.

Q. Yes. Now, relative to the filling and backfill, if any, that was really your original idea—that was your responsibility, wasn't it?

A. No, I wouldn't say that. I don't know whether it needed a backfill. Mr. Gillis said it needed it, and I presumed it would have to have it.

Q. Yes. That was when you proposed it?

A. No, I was not the one that told him. If anything about it was discussed, it was discussed with Mr. Gillette, not with me. [89]

Q. And when you talked to Mr. Gillis about it, that was not to be a responsibility of his?

A. No, he said he had Mr. Young put that in—I don't know what responsibility that would be.

Q. Did you, or anyone that you know of, point out this sump to Mr. Gillis?

A. I did myself. I said, "Don't fill up our sump."

Q. To Mr. Gillis?      A. Yes.

The Court: I think we will take a 15 minute recess.

Mr. Tanner: Mrs. Gillette, you and your husband ordered the backfill around the basement put in?

A. We did not order it. They came and said it needed it.

Q. At that time you knew, of course, you knew the finishing had not been put on?



(Testimony of Mrs. Irene Gillette.)

A. Well, I spoke to him about it then.

Q. But you knew it was not on at that time?

A. Yes, sure. He would not let us put it on.

Q. Now, as a matter of fact, under the general plan that was suggested and under the exhibit which says "full concrete basement," there is no specification there as to any water-proofing, is there?

A. No, we wanted to do it ourselves. It was our own idea.

Q. Yes. Of course, under your arrangement as you have testified, there was no time specified as to when payment should be made or anything of that kind? A. No, there was not. [90]

Q. And during that time, Mr. Gillis told you he would not be able to complete the rooms, and so on, until the next year?

A. That was the part we did not build.

Q. Now, calling your attention to the plumbing, Mr. Metrovich had that in his hands?

A. That is right.

Q. And the draining of the pipes?

A. That is right.

Q. The responsibility was not on Mr. Gillis?

A. No.

Q. And so that, Mrs. Gillette, as a matter of fact, if the pipes froze, it would be Mr. Metrovich that would be responsible?

A. Well, I don't quite understand that myself. He said in his bill, "Due to the basement freezing." Well, it kept freezing because there was no base-



(Testimony of Mrs. Irene Gillette.)

ment, and we had to buy a lot of chinking and put in there where the house met the foundation. It is a small matter, \$24.00—I would not argue about that.

Q. Well, the pipes and everything I take it, were drained before the house was moved? A. Yes.

Q. So it was not Mr. Gillis that ordered the furnace to be started again, was it?

A. Well, he kept it going all winter—somebody did.

Q. But any trouble in the plumbing would not be Mr. Gillis' fault, would it?

A. Well, I wouldn't argue about \$24.00 anyway. It is a small item; we have so many we left out of that bill that it is sickening right now to think we did not find them—\$20.00 for oil, a ton of coal——

Q. Just a minute. Let me ask the questions, please.

A. Well, no one would know if they weren't mentioned—— [91]

A. Well, you would not know about that unless I mentioned it——

Q. As a matter of fact, Mrs. Gillette, we did have a bad storm in 1945, didn't we? A. Yes.

Q. Did you know your flue had not been inspected from that date?

A. I don't imagine so; I would not say.

Q. So that the condition of it after the 1945 storm, you would not know about?

A. No, I would not swear to anything, but the furnace burned all right.

(Testimony of Mrs. Irene Gillette.)

Q. Well, all right. Now, relative to this sump that you talked about, Mrs. Gillette, you mentioned that the cost—as a matter of fact, how was it fixed?

A. There was a big tank put in there. I know it was, and there was a tank outside connected with this sump, and there was a big oil tank put in——

Q. It was to be used as a cesspool?

A. It was to be an overflow.

Q. Now, what did it cost?

A. \$39.75. We did—we could not find the barrel until a long time afterwards. We have found it since, but we did not find it at that time.

Q. Now, Mrs. Gillette—you have mentioned—you stated that Mr. Gillis took a pump away and then you stated that Tony asked you for the pump——

A. Yes, he said he needed a pump and it seemed to me he said on Carlson's job or something, and I was sort of anxious to be accommodating.

Q. As far as you know, Mr. Gillis did not talk about that?

A. I presume not. As far as I know, Mr. Gillis had nothing to do with it. [92]

Q. Now, Mrs. Gillette, you first stated, I believe, didn't you, that you did not know anything about the cutting off of the cornice?

A. Not until it was done.

Q. Well, then didn't you state afterwards that Mr. Gillis came down to the office of the Nome Motor Company and told you that he was going to cut it off?

(Testimony of Mrs. Irene Gillette.)

A. Well, he had already cut it off—he must have, because I went down there that night and it was done——

Q. When did he see you?

A. Well, after 5 o'clock, I went down to see what had happened. I don't know when he did it, but before he moved the poles it was done.

Q. As a matter of fact, you don't know that it was done before he spoke to you?

A. It would not need to have been done if the pole was moved.

Q. You did make the statement, though, that it was done before that?      A. Well, I could have.

Q. Now, Mrs. Gillette, you state you spent quite a long spell in the hotel and so on; when did you start to have repairs done which were necessary for you to go into the house?

A. Well, right after Mr. Gillette was up to see Mr. Gillis—I would say sometime about the 28th of January—about that time anyhow. You say we got into the house—well, the matter of getting into the house was a matter of getting some steps before we could get into the place.

Q. Yes, you told us that; but what I want to know is that the records show in this case that the work ceased on the [93] 16th day of the month?

The Court: What month was that?

Mr. Tanner: The 16th day of December, Your Honor.

A. Well, we talked to Mr. Gillis in the North

(Testimony of Mrs. Irene Gillette.)

Pole at least a couple of times after that, and he said he would be down any day.

Q. When did you talk to him?

A. I know it was after Christmas. It was after he got married, and that was about the first of the year.

Q. When you say "we," whom do you mean?

A. My husband and I. We had to eat at the North Pole.

Q. Now, you told us under direct examination that at one time you claimed you saw Mr. Gillis in January.

A. Yes. He was sitting at the counter at the North Pole, and we did very meekly ask him when he would get at our house. We just sat at the table and asked him how he was getting along with it.

Q. Well, you say you were very meek about it——

A. Well, the only time I got mad was when he said, "Well, I didn't want to do it anyway," and I said, "I am well aware of it"; I never got mad before.

Q. All of the time that you were so meek, during that time, you knew that the contract had been broken?

A. Well, I did not say that—what you call a contract, I did not know that it was broken; as far as I was concerned, it wasn't. [94]

Q. In other words, Mrs. Gillette, you did not consider your—what we call an estimate, you did

(Testimony of Mrs. Irene Gillette.)

not consider moving operations to be completed in October as a violation of contract when they weren't, did you?

A. Well, I was not even thinking that way. I intended to pay every cent of that \$2800 as soon as the work was finished. I could have had fourteen people as witnesses if I had had any intention of a broken contract, or had known there would be a broken contract.

Mr. Tanner: That is all.

Mr. Cochran: That is all.

The Court: Call your next witness.

BEN F. GILLETTE

sworn.

Direct Examination

By Mr. Cochran:

Q. Your name is? A. Ben F. Gillette.

Q. Irene is your wife? A. She is.

Q. And you are one of the defendants in this case? A. I am.

Q. Do you know Mr. Gillis? A. I do.

Q. How long have you known him?

A. Oh, a little better than two years. He said he didn't know me, but I knew him.

Q. You are familiar with the house that was moved, as alleged in this case?

A. I have lived in there 12 years, yes.

The Court: Just answer the question, Mr. Gillette. You don't need to make any remarks.

Mr. Cochran: Did you have an agreement with

(Testimony of Ben F. Gillette.)

Mr. Gillis about moving this house?

A. I saw the agreement—I took it for an agreement, a contract. [95]

Q. When was that, Ben?

A. Well, when she—my wife got it up at the Nome Motors office and brought it down.

Q. About what time was that?

A. Well, I would say it was around the 8th of August. That was when the agreement was made. It was later than that that we got it, I think.

Q. Ben, I will show you defendants' Exhibit No. 1 and ask you if you recognize it.

A. Yes, that is the one I saw and I took it for a contract.

Q. When did you first see this, Ben?

A. Well, I think it was sometime after the 8th of August; I could not say exactly the time.

Q. Who showed it to you?

A. My wife had it.

Q. Did you read it?

A. I did. I took it for granted that we would pay that when the work was completed.

Q. I show you now Defendants' Exhibit No. 2, a plat of the building; do you recognize that?

A. I do; that is her own drawing.

Q. Was that with this agreement?

A. Yes, it was.

Q. Did you see Mr. Gillis with relation to this agreement?      A. I did.

Q. How long after?



(Testimony of Ben F. Gillette.)

A. When he was going to move the building. He came down and measured and I went down and told him how the windows were to go in and all that.

Q. Well, did Mr. Gillis speak about this agreement?

A. Well, I took it for granted he was going to do the work.

Q. Did he say he was going to do the work?

A. No, he didn't. [96]

Q. Were you there then?

A. I was. I said——

Mr. Tanner: If the Court please, again the leading questions are coming in. I don't like the witness lead by these leading questions.

Mr. Cochran: Well, I think he should be allowed to tell the Court what occurred at that time——

A. I told him to go ahead on the contract.

Q. What time was that, about, as near as you could fix it, after the 8th of August? About how long was that?

A. It was a short time.

Q. Now, Mr. Gillette, after you told him to go ahead on the work, when did he start on it?

A. When did he start? Well, I think it around the 16th of September——

Q. What did he do then, Ben?

A. He started to tear out the forms out there, and he poured cement——

Q. Did you say the 16th of September?

A. About the 16th of September. He had no record, as he said——

Q. What did he start to do then?



(Testimony of Ben F. Gillette.)

A. To move those forms that were in—that Bud Harper put in.

Q. Was that September or October?

A. That was in September.

Q. In September? The 16th? A. Yes.

Q. Where were you?

A. I was at the door looking out. I could not get around much, but I could see everything that was going on.

Q. And you saw them pour the concrete?

A. I did.

Q. Can you tell me how many men were employed?

A. There were nine men and Gillis made the tenth. They did not work nine [97] or even eight hours.

The Court: Now, just a minute, did anyone ask you how long their hours were?

A. No.

The Court: Then answer the questions; only the questions that are asked.

Mr. Cochran: Mr. Gillette, when were you able to move into this house? After it was on its foundation?

A. Why, we left the hotel on the 15th of February.

Q. When did you move out of your house?

A. We left on the 15th of October.

Q. And were you able to live in your house between the 15th of October and the 15th of February?

A. No.

(Testimony of Ben F. Gillette.)

Q. Now, Ben, when did you learn that Mr. Gillis was not going to do any more work on your house? When did you learn that?

A. I never learned it myself at all—I never heard it.

Q. And did you go to see him in January, Ben?

A. Yes, I did; I waited fifteen minutes out on the street.

Q. What time in January was that?

A. It was the latter part.

Q. This year?

A. No, last year—that is, last winter.

Q. Why did you go to see him?

A. Well, Duke was to do the plumbing down there and he said the doors would not open and the building sagged, and I went up to see him about that.

Q. That was sometime the latter part of January?

A. That is right.

Q. Then when did you see Mr. Gillis, Ben?

A. After I waited fifteen minutes outside of his shop. [98]

Q. Was anyone else there when you saw him, Ben?

A. He came out alone.

Q. What did he say?

A. He said, "Why hello, Ben."

Q. What conversation did you have with him at that time?

A. Well, I told him we could not get into the house; he told me to nail a couple of 2x4's up and put under——

(Testimony of Ben F. Gillette.)

Q. Did he tell you at that time that Mrs. Gillette had ordered him to quit the work?

A. No, he did not.

Q. When did you hear that?

A. Not any time.

Q. Did Mrs. Gillette tell you that?

A. No, she never told me that.

Q. Now, Ben, state the full conversation you had with Mr. Gillis the latter part of January.

A. I waited out there fifteen minutes for him to come out——

The Court: Get to the conversation——

A. Well, the conversation was about the raising of the building over the floor and he spoke about moving the tools away and told me to nail a couple of 2x4's together and put under there, and I told him I would have to get Satterlee to do something there then, and that was the last word we had.

Q. What was the condition of the flue in your home when he started to move the house?

A. Well, it had been wrecked in moving——

Q. Well Ben, what was the condition before he moved it?

A. It was in good shape; a good job had been done at first. [99]

Q. Was it wrecked in the moving then?

A. It was.

Q. Explain how it was wrecked.

A. Well, I don't know, but they were jarred loose, the bricks, and up in the attic there was stuff

(Testimony of Ben F. Gillette.)

that had been half put together and, in going through the roof of the building, it was 21½ inches out of line——

Q. Was the flue inspected by anyone, Ben?

A. By the fire chief.

Q. And did you repair the flue? A. I did.

Q. Was it necessary?

A. Sure, it was a fire hazard.

Q. What expenditures did you make in the repairing of the flue?

A. Well, I tore out some of the old blocks and replaced them and cut out part of the roof and put in five new bricks.

Q. How long did that take you?

A. Around 30 or 32 hours, something like that.

Q. And who did you get the extra blocks from?

A. From Larry Galvin.

Q. Was it necessary to wreck that flue entirely in moving the building?

Mr. Tanner: Well, if the Court please, I don't like to keep objecting, but these are leading questions again.

The Court: I don't think it is a proper question, Mr. Cochran——

Mr. Cochran: Now, where was this building first moved to?

A. Well, it was moved from the beach up onto where it stands now.

Q. When was it moved from the beach? When it was started? A. That's right. [100]

(Testimony of Ben F. Gillette.)

Q. When did they start to move the building?

A. On the 15th of October.

Q. Where? A. Out into the street.

Q. How long did it remain in the street?

A. Oh, I cannot tell you that.

Q. Well, about how long?

A. Well, it was a long time; I would not say about how long.

Q. Now, did the plaintiff in this case complete the basement? A. He did not.

Q. What did he fail to complete?

A. He did not put in the basement floor——

Q. Did you discuss with him the basement floor?

A. I did, and told him where I wanted the hole for the septic tank.

Q. Was there a septic tank, you say, Ben? What did you tell him about that?

A. Yes, the septic tank was to go straight down from the floor above and there were two places to be left open when the cement was put in.

Q. Was that filled up—did you have an excavation made for a septic tank?

A. No, we did not, but I meant for him to leave a hole in the cement.

Q. He did not put in the cement, did he?

A. No.

Q. Well, who put in the floor? A. I did.

Q. What was the condition of the floor as to being frozen or thawed?

A. Well, I thawed on it four months with wood,

(Testimony of Ben F. Gillette.)

coal and the furnace, and I had a pump there that I circulated the water through; and I picked frost and got it in [101] shape before starting to put the floor in.

Q. Was it necessary to thaw it?

A. It had to be thawed.

Q. How did it happen to freeze?

A. By not putting in the floor when it should be.

Q. Was the form in there in ample time before the frost?

A. Sure. He put in the floor on the 20th of October and he held it up——

Q. Now, Ben, if the building had been put on and properly cared for, would the floor have frozen?

Mr. Tanner: Just a minute, Your Honor, these leading questions again——

The Court: I don't think any foundation has been laid—and I don't mean the floor foundation. Well, it is 12 o'clock; we will recess until 1:30 this afternoon.

Direct Examination

(Continued)

By Mr. Cochran:

Q. Mr. Gillette, how many cubic yards of cement did Mr. Gillis pour for the walls of this basement?

A. 24 cubic yards.

Q. How long was he in pouring it?

A. Well, about eight hours with the gang he had.

Q. Do you know how many men he had pouring this?

A. He had nine and himself made ten.



(Testimony of Ben F. Gillette.)

Q. You saw the process of pouring?

A. I saw it from the door there, yes.

Q. Of your house? A. Yes. [102]

Q. Has the basement floor been poured—laid?

A. I poured it, yes.

Q. You testified as to how long you were thawing it out, didn't you?

A. Yes, it was about four months.

Q. Now, how long were you occupied in thawing this basement and in pouring the concrete?

A. Well, it was between those four months I was pouring the concrete.

Q. What would you say was a reasonable value of your labor in pouring this concrete?

A. Oh, about \$325, or something like that.

Mr. Tanner: Just a minute—do you want something to refresh his memory? I would like to know the purpose——

Mr. Cochran: What was the reasonable value of your work, Ben?

Mr. Tanner: Just a minute—the witness has not established the work so we can tell anything about it, and it seems to me the time put onto that job is too indefinite and uncertain to be permitted——

Mr. Cochran: Well, he said he was about four months——

The Witness: Well, about an hour every day building a fire——

The Court: Just a minute—it seems to me that the reasonable value of this should come from one whose skillfulness and ability is established.



(Testimony of Ben F. Gillette.)

Mr. Cochran: All right. What was the size of the basement floor?      A. It was 24x30.

Q. And what thickness was the floor?

A. I put it down four inches thick—cement.

Q. Can you give me approximately the number of hours you put in in thawing, and the basement floor preparing to put in the cement, and putting it on? Putting the cement on?

A. Oh, about 160 hours.

Q. Do you know what is paid regularly in Nome for that character of work?

A. I don't know.

Mr. Tanner: Just a minute—this man has not established himself.

The Court: The answer was that he doesn't know.

Mr. Cochran: Now Ben, did you do all the work yourself in pouring this basement floor?

A. I did.

Q. And there were close to nine cubic yards put on the floor?      A. Of cement? Yes.

Q. You mixed it all yourself?      A. I did.

Q. Now, then Ben, when they put the building on this basement, had the building sagged?

A. It was sagged, yes, when we could not get into it.

Q. What do you mean, when you could not get into it?

A. The doors would not open.

Q. How much had it sagged?

A. Well, Pete Satterlee raised the posts and he

(Testimony of Ben F. Gillette.)

said four inches.

The Court: Don't say what someone else said. If you know yourself, you may answer.

The Witness: Well, it was sagged between four and five inches.

Mr. Cochran: Was it necessary to have that leveled before you could open the doors?

A. It was, of course.

Q. And did you have those posts put in?

A. We did. [104]

Q. Were there posts put into the building before it was moved? A. I did——

Mr. Tanner: Pardon me—the witness has not testified to that; it is just leading again——

Mr. Cochran: Were there any posts in the building before it was moved? A. There were.

Q. How many?

A. Well, about 8 feet apart, running right through and 24 in length.

Q. Now, who put those posts in for you, Ben?

A. When the contractor built the house——

Q. No Ben, I mean after it was sagged on its present location? A. Oh, Pete Satterlee.

Mr. Tanner: Pardon me, I am confused myself—I understood you to ask if there were any braces in there, apparently meaning before it was worked on——

Mr. Cochran: Yes. On the south side of the street when the building was built——

The Court: I think it was testified to that the

(Testimony of Ben F. Gillette.)

posts were put in there originally when the house was built.

Mr. Cochran: Did you get a bill from Mr. Satterlee for this work?      A. Yes.

Q. (Mrs. Gillette, where is that bill?) (Paper handed to Mr. Cochran.) Is that the bill you got from Mr. Satterlee for that work?

A. It is. That is the bill, in his writing.

Q. I offer this bill in evidence. There was another item [105] in the cesspool, included in this check and not segregated.

Mr. Tanner: It is still not segregated, is it?

Mr. Cochran: Yes, it is the first item there; we apparently have got to lose that. It is all together, Your Honor, but it is segregated in the bill.

The Court: Well, it can be segregated by the testimony.

Mr. Cochran: That is just what I am going to do, Your Honor.

Mr. Tanner: There is nothing to show where that bill is from——

The Court: Well, it is testified to——

Mr. Cochran: The first item is the one, Your Honor——

The Court: That is the septic tank, 35 hours, the second item is 47, and then the work around the stairs is the third item, apparently.

Mr. Cochran: That was the siding.

Mr. Tanner: If the Court please, the witness keeps pulling out a paper and I don't know what it

(Testimony of Ben F. Gillette.)

is—I don't want to see it continually referred to——

Mr. Cochran: Well, we will show it to you. Now, referring to that bill, state how much you paid Mr. Satterlee, Ben, for putting in the braces under the building where it now stands.

A. Well, the bill shows there \$175.00. My wife has been keeping the books—I don't know.

The Court: The question was how much does that bill show for putting in the posts.

A. 47 hours at \$1.75 an hour.

The Court: Does the bill show the rate?

Mr. Cochran: Yes, Your Honor. It shows the work done and the [106] rate. I offer it in evidence, Your Honor.

Mr. Tanner: No objection.

The Court: It may be received and marked "Defendants' Exhibit 3."

Mr. Cochran: Was there—did I ask you about this sump? I am not sure.

Mr. Tanner: Yes, you did.

Mr. Cochran: This witness?

Mr. Tanner: Yes.

Mr. Cochran: I think that covers—no it doesn't either. Now Ben, this building was moved onto the concrete foundation above the basement—onto the basement foundation about what time? About what time was it that the plaintiff in this case, Mr. Gillis, got this building moved onto the basement?

A. I wasn't down there to know, but I would say sometime in November.

(Testimony of Ben F. Gillette.)

Q. About what time in November?

A. Well, sometime after the first of November—I don't know exactly because I wasn't down there at the time.

Q. Now, Ben, what was the condition of the building when he put it on there, with reference to being open and exposed to the weather?

A. Well, the windows in the basement were all open and the new addition was all open, and the building was left alongside of the cement there for several days. They took all the men and went to work for Grant Jackson, and let the basement freeze up. [107]

Q. Did the basement freeze up, you say?

A. I did, yes.

Q. Why?

A. Well, the reason was because the building was not on in time.

Q. Now, was there any plumbing damaged by reason of this freezing?

A. Well, according to Duke's bill, there was.

Q. I don't care about that, Ben. I just want to know what you know about that.

A. Well, it was damaged through the moving, I know that.

Q. Not through the freezing? A. No.

Q. But through the moving? A. Yes.

Q. Was the furnace connected up in the basement after the house was moved? A. It was.

Q. When?

(Testimony of Ben F. Gillette.)

A. I think—it is hard for me to say, I was not down there.

Q. About what time was it, don't you know?

A. Well, sometime in November.

Q. Sometime in November? A. Yes.

Q. Was fire kept in it?

A. Yes, all the time.

Q. Who kept the fire?

A. The people that worked in there had a fire there.

Q. Who was using the building?

A. Well, Mr. Gillis' men.

Q. And why did they keep a fire in it?

A. Well, so they could work.

Q. Now, this concrete chimney—I believe I asked you questions about that, didn't I? Have you testified about the chimney?

A. I believe I have. [108]

Q. Now, Mr. Gillette, was the dining room completed, as shown in the plat, by Mr. Gillis?

A. No, it wasn't finished.

Q. What was done to it?

A. Well, there was plywood put onto it. Mr. Margraf put that on.

Q. I want to know what Mr. Gillis did on that?

A. Well, he had the celotex on, but they had no studding on the windows to nail anything to.

Q. Did you have that completed? A. Yes.

Q. Who did that? A. Margraf.

Q. At what cost?



(Testimony of Ben F. Gillette.)

A. 130 hours at \$2.00 an hour.

Q. \$260.00? A. Yes.

Q. Did you pay Mr. Margraf that amount?

A. We did, sure.

Q. Now, did you have a pump at your place?

A. Yes, it was a good one too.

Q. What kind of a pump was it?

A. It was a Burk.

Q. Did Mr. Gillis take that away?

A. I don't know—I did not see him; that was borrowed through my wife, which I knew nothing about at that time.

Q. Do you know Tony?

A. He was the one that got it.

The Court: How do you know he took it away?

A. We had it in the warehouse there.

Mr. Cochran: Did you see him, Ben?

A. I did not see him.

Q. Did somebody tell you?

A. They borrowed it from my wife.

The Court: Did someone tell you? Answer the question. A. No.

The Court: The answer will be stricken——

Mr. Cochran: You knew Tony?

A. I knew him, yes.

Q. And what was he doing around there?

A. Well, he was moving the skirting of the building there, and I saw him around the evening before they moved the building.

Q. Who was in charge of the work there for Mr.



(Testimony of Ben F. Gillette.)

Gillis?           A. Tony.

Q. Now, what did this pump cost you?

A. \$150.00.

Q. What was the value of it at the time it was taken away?

A. We put the same value on it we paid for it, only it had more fittings.

Q. What condition was it in?

A. Well, Harper said it was OK.

Q. I am asking you.           A. It was OK.

Q. Has it ever been returned?           A. No.

The Court: Have you asked Mr. Gillis to return it?           A. No, I have not.

The Court: Have you asked Tony to return it?

A. No, I haven't. I haven't seen any of them.

Mr. Cochran: Has Mr. Gillis ever offered to return that pump?

A. Not to my knowledge—not to me, no.

Q. Where is Tony?

A. I think he is outside.

Q. Do you know his last name?

A. No, I don't—only by "Tony."

Q. Do you know where they took that pump?

A. I do not know.

Q. Did they discuss with you—speak to you about taking it?           A. They did not.

Q. That was with Mrs. Gillette?           A. Yes.

Q. Now, Ben, in the moving of your place across the street, was it necessary to cut off the corner of the building—the [110] cornice of the building at the corner?

(Testimony of Ben F. Gillette.)

A. If I had the contract to move it, I would have certainly measured it——

Mr. Tanner: Just a minute, unless this person knows what he is talking about, I object——

The Court: Objection sustained.

Mr. Cochran: All right. Now Ben, was the corner of the building cut off by Mr. Gillis in the moving of it? A. I don't know.

Q. Did you see it?

A. I don't know whether he cut it off——

Q. What would you say would be a reasonable cost of repairing that—it was cut off, wasn't it?

Mr. Tanner: Just a moment, Your Honor——

The Court: I will sustain an objection to that.

Mr. Cochran: Are you familiar with what carpenters charge for their work around here?

A. We got familiar with it the last year or two.

Q. Well, now do you know about how long it would require a carpenter to fix that?

A. Well, it would probably——

Q. Well, Ben, I said do you know about how long? A. About 50 hours.

Q. Yes or no, Ben—do you know? Just answer my questions. A. No.

Q. You don't know? A. No.

Q. Do you know the approximate cost of material to fix that? A. No, I don't.

Q. You don't know about it at all?

A. No. [111]

Q. You say you don't know who cut that corner off? A. No.

(Testimony of Ben F. Gillette.)

Q. Did you?           A. No.

Q. Did you have it done?

A. No, I did not.

Q. Now, Ben, the concrete walls of the basement—what is the condition of those now?

A. The walls are cracked.

Q. How many places?           A. About five.

Q. How much?

A. Well, enough to let the water seep in.

Q. Did you ask Mr. Gillis to make any protection of the walls?

A. Well, if the floor of the basement had been put in in time, it would have saved the walls.

Q. What was the reason for those cracks in your opinion?           A. Well, it was because——

Mr. Tanner: Just a minute—I object——

The Court: Objection sustained.

Mr. Cochran: Your Honor, I don't know how I can get qualified testimony——

The Court: Well, he might be qualified, or might not——

Mr. Cochran: Are you familiar with concrete walls?

The Court: What is the question?

(Question repeated to Court.)

The Court: That does not mean anything. That is a question without any connection——

Mr. Cochran: All right, Your Honor. Now, Ben, are you familiar with climatic conditions of Nome?

A. Yes.

(Testimony of Ben F. Gillette.)

Q. How long have you lived here?

A. About 48 years.

Q. Are you familiar with the conditions of the ground during the seasons?

A. Yes, the frost has a great effect on the ground. [112]

Q. Are you familiar with the ground where this concrete basement was poured?

A. I have been, yes.

Q. Ben, what in your opinion, is the reason for those walls having been cracked after having been poured?

Mr. Tanner: Just a minute—the proper foundation is not laid.

The Court: Objection sustained.

Mr. Cochran: When did that crack?

A. Last winter.

Q. Was there any reason, so far as you know, why Mr. Gillis could not and did not pour the floor in this concrete basement?

A. No reason whatever. He could have done it before the frost.

Q. How long did he have to pour that before the frost, approximately.

A. Well, approximately, he could have poured it by the 20th—

Q. How long a time?

A. He said he wanted seven days to leave it set, then he would pour the floor.

Q. Do you know of any method of repairing

(Testimony of Ben F. Gillette.)

these cracks in the concrete walls of the basement?

A. No, I do not.

Mr. Cochran: You may cross-examine.

### Cross-Examination

By Mr. Tanner:

Q. Ben, what date did it freeze last fall?

A. That I do not know.

Q. Then what did you mean when you said the basement could have been poured before the frost.

A. Well, he certainly had plenty of time from the 8th of August until the time it did freeze to do it. [113]

Q. What time did it freeze?

A. Sometime, I suppose, about the first of November.

Q. You don't know, though?

A. No, but it is around that time.

Q. Does it sometimes freeze in September?

A. Sometimes, yes.

Q. When did you notice the wall had cracked in the basement?

A. This Spring—last Spring.

Q. When?

A. As quick as the water got to running and thawed out.

Q. When?           A. Along in May or June.

Q. So all you know, as far as the time goes, from the time it was poured and the time you observed it this Spring, there were some cracks; is that

(Testimony of Ben F. Gillette.)

right?           A. Yes.

Q. Now, Ben, part of the dining room was put up by the plaintiff, is that right?           A. Yes.

Q. Now, in answer to the questions about the dining room, as specified by the plat what was done by the plaintiff; will you tell us just what was not done by the plaintiff; tell us by this plat?

A. Well, here is the kitchen and the dining room——

Q. Yes, but as outlined by your plat, just what was done?

A. Well, it was 8x30 feet long on the end of this building—that was in this agreement——

Q. Well, you stated the main portion was put up, wasn't it?           A. Yes.

Q. Now, what details, according to the plat, were not completed?

A. I don't understand you—— [114]

Q. Are there any details shown, Ben, by this plat not completed by the plaintiff?

A. Of this dining room?

Q. Yes.

A. There was no sheeting put on and there was no celotex put on——

Q. Was the sheeting specified on the plat?

A. Well, we were supposed to have it built, weren't we?

Q. Well, there is nothing to specify anything relative to sheeting, is there?

A. No, not that I know of.



(Testimony of Ben F. Gillette.)

Q. Now, Ben, on this construction—on the details as to what you wanted done, you instructed the plaintiff from day to day as to what you wanted done, didn't you?      A. I did not.

Q. Well, you said you tell him how the windows were to be put in?

A. Yes. Outside of that, I did not have anything more to do with it.

Q. Who did?

A. My wife seen him and I seen him once at the coffee shop there—that was the only time.

Q. Well, Ben, this plat does not show how you wanted the porches of the building completed, does it?      A. It appears to me that we showed it.

Q. Does it show what kind of materials to be used?

A. We were to furnish the materials.

Q. Well, Ben, does this plat show that? It does not, does it?      A. No.

Q. Now, Ben, take defendants' Exhibit One, does that show the details of how the various items are to be constructed?

A. That is up to the contractor to give us that. [115]

Mr. Cochran: I object to that—it speaks for itself.

Mr. Tanner: I won't press that, Your Honor. Now, Ben, you stated that you were up sometime the latter part of January to see the plaintiff.

A. I did.

Q. And you saw him in front of his shop?



(Testimony of Ben F. Gillette.)

A. Yes, I waited until he came out.

Q. And your purpose was to see if he could do some work? A. Yes.

Q. Now, he told you why he wasn't coming back?

A. He told me he took his tools away; he did not tell me why.

Q. Didn't you ask him why?

A. No, I didn't.

Q. I see. Now, Ben, from the time the house was moved onto the foundation—and by the way, what was that time, did you say? On or about what time was the house moved onto the foundation?

A. Sometime around, I suppose, the first of November—I did not see it. I know it was up there on stilts and his men working on the bank building, and that was after the storm.

Q. What date did you see it raised up on stilts?

A. The 29th of October, or something like that.

Q. But you do not know that?

A. Well, it was about then.

Q. How do you place the date?

A. Well, when did the storm come?

Q. So you would not be able to say just when it was put on? A. No.

Q. Now, when the building was placed, was there a sag in the building?

A. I don't know—I don't think there was. [116]

Q. When did this sag develop that you are speaking of?

A. Sometime, I suppose, it was in December.

Q. When did you learn of it?

(Testimony of Ben F. Gillette.)

A. In December sometime.

Q. How did you learn of it?

A. It was through the man that was doing the plumbing.

Q. He told you that?

A. Yes. I could not get around very well then.

Q. So that, that might be a month after it was on the foundation, isn't that right?

A. No, I don't think so.

Q. But you don't know, do you? A. No.

Q. But it was all right when it was put on; is that right? A. I suppose so, yes.

Q. Now, you were anticipating having the cement basement? A. Yes.

Q. And no doubt, cement pillars? A. No.

Q. In other words, to be permanently braced, the basement would have to be poled, isn't that correct?

A. Yes, I asked him to put those posts in at the time it was moved, but those posts were never there and never did show up.

Q. What I am trying to get at is that it would not be a permanent bracing until after the basement was poled, would it? A. No.

Q. And with the shifting of the weather, any house is likely to move in this country, isn't it?

A. Yes, but that ground at one time was not frozen——

Q. It is on frozen ground, isn't it, originally?

A. Yes. [117]

Q. And so the temporary pillars placed under

(Testimony of Ben F. Gillette.)

the building, with heat in your furnace, would probably cause it to sag a little bit, due to the thawing, and so on?

A. It never was put in.

Q. Would you answer what you think about that.

A. Yes, it would thaw.

Q. Now, Ben, you have stated relative to the flue—when did you examine that last before your building was moved?

A. I was there in the spring after the storm; it was in perfect shape.

Q. You have a cased-in flue, don't you?

A. Yes.

Q. Did you remove the boards to see how it was?

A. No, I didn't.

Q. Ben, did you or did you not testify that you saw the plaintiff the day after learning of the sagging of the building, and went to see him about it?

A. Somewhere around there.

Q. And you testified that you went to see him the latter part of January, didn't you?

A. It was about that time.

Q. So that the first you learned of the sagging was the latter part of January, wasn't it?

A. Yes, it was sometime the latter part of January—I don't know what time. I did not suppose I was going to have to keep those dates.

Q. Now, Ben, you made the statement that the plumbing was damaged in the moving of the building; what part of that was damaged, and how do you know when?

(Testimony of Ben F. Gillette.)

A. Because the pipes were all twisted.

Q. When did you determine that?

A. I went down underneath and looked in the basement. [118]

Q. And when did you look?

A. I don't know exactly the time, but as quick as I could get down into the bottom——

Q. You heard your wife testify that, relative to the plumbing, it was due to freezing

A. I don't believe I was down in the place until after I saw Mr. Gillis at his shop. I tried to get Mr. What-Do-You-Call-Him to go down there and fix—or am I to keep quiet?

Q. Now, Mr. Gillette, the work done by Mr. Margraf was not necessary because of any unworkman-like work on the part of the plaintiff, was it? In other words, it was just work that he did not do, wasn't it?

A. That is right.

Q. Yes. That is all, Your Honor.

Mr. Cochran: Call Mr. Hite.

## GEORGE HITE

### Direct Examination

By Mr. Cochran:

Q. Your name is George Hite?

A. Yes, sir.

Q. What is your business, Mr. Hite?

A. Construction work and contracting.

Q. Carpenter? A. That's it.

Q. You are familiar with moving buildings, George? A. I am.

(Testimony of George Hite.)

Q. You are engaged in that business?

A. Yes, sir.

Q. How long have you been in that kind of work, Mr. Hite?

A. Ever since 1943, in Nome, or '44—'43, I think.

Q. And you have had a lot of experience in it?

A. Yes, sir.

Q. You were subpoenaed to appear here as a witness, George?

A. Yes, sir. [119]

Q. Do you know where the Gillette residence was?

A. I do.

Q. Do you know where it was moved to?

A. Yes, sir.

Q. What would be the reasonable cost of building an addition to that residence, 8x30 feet?

A. Well, I would not like to say in the Court or outside; I could estimate the cost, of course, but to get up in Court and tell you that would be——

Q. Well, I am just saying “to put on an addition”——

A. Well, I don't know anything about it. I would have to have plans; it might be a million dollar job or even a ten dollar job, I don't know.

Q. Well, such as the Gillette house—to put an addition on the side of it, put on the roof and the floor, and estimate a concrete basement under it—what is your opinion?

A. I have no opinion at all. I do not do guess-work.

(Testimony of George Hite.)

The Court: Well, I think the question is entirely too general. It might be built with cedar, fir, spruce or logs off the beach. The answer cannot be responsive to any of the issues in this case.

Mr. Cochran: I am not speaking of the material used. I am just speaking about putting up that addition and finishing it.

The Court: I will not permit the question to be asked in that way—it is too general.

Mr. Cochran: Would your Honor hear me on that?

The Court: No, it is too general. I think the answer is perfectly clear and correct. He must have plans and specifications and should know the materials.

Mr. Cochran: I think Your Honor should understand my position in the matter. I am undertaking to show that this contract—this offer specified the building of that addition, which was not built.

The Court: That is a question in this case. Does the plat show any size?

Mr. Cochran: Yes, Your Honor, it does show size; it gives the size of 8x22, 29x30—build-on 8x22. Yes, it shows it very clearly, Your Honor.

The Court: Is that ground space? The 8x22?

Mr. Cochran: No, Your Honor, it is on the plat itself.

The Court: There is nothing there on height?

Mr. Cochran: That is true, Your Honor—nothing on height.



(Testimony of George Hite.)

The Court: Your question does not have anything on height or materials; you may continue.

Mr. Cochran: George, do you know the inside height of the Gillette home? A. No, I don't.

Q. We will say it is 8 feet; would that make any difference?

A. I would not know. I never was in it; I was in the basement, but never in the house.

Q. Mr. Hite, in asking the question, I meant that all materials were to be furnished—just the construction of an addition to this house, 8x22 feet—

The Court: That does not aid the Court. I reject the question and direct the witness not to answer.

Mr. Cochran: Mr. Hite, did you see the building after it was moved? A. No, sir. [121]

Q. Do you know where it was moved?

A. No, I never seen it being moved at all.

Q. But you know the building and the nature of the building? A. Yes.

Q. All right. Mr. Hite, for the moving of that building across the street from the location where it was to where it is now, what would be a reasonable time?

A. I could not say that, Mr. Cochran, in the Court without figuring the job, because I don't know. I would know little about the moving. Mr. Rank did ask me to do so, and I asked Mr. Rank to tell Mrs. Gillette to talk to me and that was all I know about it; and it is pretty hard to say unless you figure it. I let the other fellow do it if he can do it cheaper.



(Testimony of George Hite.)

Q. Then, you do as you agree to do?

A. Well, I have always done it.

Q. Now, Mr. Hite, would you say that 987 hours was a reasonable time to consume in the moving of that building?

Mr. Tanner: That is not specific enough and does not give a basis for the proper answer, Your Honor——

The Court: I think the witness has made himself clear—that he is not competent to answer any questions in this case. We will take a 15 minute recess.

Mr. Cochran: Mr. Hite, were you down in the basement of the Gillette residence?

A. Yes, sir, I was.

Q. About what time was that?

A. I don't remember; it was sometime before August. I went down there with Mr. Gillette; [122] I went there to get some keys.

Q. Did you observe the posts that had not been put in there?

A. Indeed, I could not say; I just wanted to get some keys and did not pay any attention to the conditions—I did not observe anything.

Q. Did you see the sagging of that building?

A. No, I didn't. I never even looked for that. I did not notice anything like that because I wasn't looking for that—I just went to get some keys.

Mr. Cochran: All right, that is all, Mr. Hite.

Mr. Tanner: No questions, Your Honor.

The Court: Call your next witness.

Mr. Cochran: Call Mr. Margraf.

OSCAR A. MARGRAF

witness sworn;

Direct Examination

By Mr. O. D. Cochran:

Q. Your name is Oscar Margraf?

A. Oscar A. Margraf.

Q. You live here in Nome?

A. Yes, I have a residence here.

Q. Are you a carpenter? A. No.

Q. Do you do carpenter work?

A. I do some, but I do not follow it as a profession. I am a miner.

Q. Did you do some work for Gillettes?

A. I did.

Q. On their building?

A. Yes, I finished some little work they had to do before the frost.

Q. What did you do for the Gillettes on their building?

A. You want me to tell about the work?

Q. Yes.

A. I finished the outside of the building, put on the asbestos shingles and finished the eaves, and then [123] I finished the interior of one of their rooms; that is the extent of my work.

Q. That was completed?

The Court: Just a moment; what room?

A. Well, that extension that was on after it was moved—I presume the dining room.

Mr. Cochran: Was the work you did necessary to the completion of it?

(Testimony of Oscar A. Margraf.)

A. Well, it needed finishing.

Q. Was it necessary?

Mr. Tanner: Just a moment; he told what he did.

Mr. Cochran: What were you paid for that work?

A. I was keeping my own time and charged them \$2.00 an hour and it came to \$260.00; there was no question about it.

Q. How long were you there, Oscar?

A. 130 hours. I kept my own time.

Q. Did you see what Mr. Gillis had done there? You saw the work he did?

A. I don't know who done it.

Q. Will you tell the Court where they put three rolls of tar paper on that building?

A. Well, I have no way of telling about that, because it would be covered up.

Q. How much would it take to cover the roof?

A. I don't exactly know the size of it; Mr. Gillis could tell you.

Q. I want you to tell us; 17x7 feet, how many rolls would it take to cover that?

A. Well, you would have to tell me what kind of paper they used.

Q. How many feet would it take to cover? He has a charge for three rolls of tarpaper, and I want to know what has [124] been done about padding the account.

(Testimony of Oscar A. Margraf.)

The Court: Well, I think your remarks are out of place, Mr. Cochran.

Mr. Cochran: Didn't you tell me in the hallway there was no place that could have used three rolls of tar paper?

A. No, I did not make any remark like that.

Q. You are familiar with buildings?

A. Well, I presume I have put up over 100 of them.

Q. Oscar, was it necessary in the work he did there—could he have used 300 pounds of nails?

Mr. Tanner: Do you know what work was done there? A. Yes.

Mr. Cochran: You saw what was done? What have you reference to?

A. Well, all I saw—it was a lean-to put on there, and it was put on in a mechanical way, but it was not finished.

Q. Would they use 300 pounds of nails?

Mr. Tanner: That is entirely irrelevant, and there is no evidence before the Court that 300 pounds of nails were used at all.

The Court: Well, the witness has indicated that he does not know who did the work or how much was done.

Mr. Cochran: Is that correct, Mr. Margraf?

A. Yes.

Mr. Tanner: No cross-examination.

Mr. Cochran: Call Mr. Gillis, please.

## W. M. GILLIS

## Recross-Examination

By Mr. Cochran:

Q. Mr. Gillis, would you tell the Court what would be the reasonable cost of the construction of the room marked "bedroom" as shown on this plat? [125]

The Court: May I see the plat, please?

Mr. Cochran: Yes, Your Honor. The reasonable cost of the construction of the cost of that, Mr. Gillis?

The Court: As I understand it, this room was already in the building.

Mr. Cochran: No, it is not there yet, Your Honor. You don't understand it right. Now, either you or I are wrong about that—It was a build-on, Your Honor.

The Court: You are referring to the folded-over piece?

Mr. Cochran: Yes, Your Honor, I meant that bedroom which was built on. That is what I want to ask about, Your Honor. Now, Mr. Gillis, (indicating), just this part—what would be the reasonable cost of building this build-on here?

A. I could not say as to that, unless I knew more about what it was to be built.

Q. What would be the reasonable cost?

A. I would have to have time to figure that out. It would take some time to sit down and figure it out, and I would have to go through a few books

(Testimony of W. M. Gillis.)

I have on such things to look it up. I gave them an estimated cost on the moving of the building.

Q. Would it be \$500.00?

A. I could not say as to that until I looked it up.

Q. Would it be \$600.00?

A. I would not set any price on it until I had figured it out.

Q. Well, can't you figure it out now. You know what you were to do on that; you figured on it before, didn't you?

A. I figured on an addition to that house. I don't remember— [126] the figure was given in an over-all estimated cost. I would not say without time to figure it up.

Q. How long would it take you to do that?

A. Oh, probably until tomorrow.

Q. That is all the testimony I have to put on your Honor, but I don't know any other way available to me to show the cost of that.

The Court: Do you have any further questions?

Mr. Cochran: No, Your Honor, I think not. I may wish to call him later on. He says he can do it by tomorrow.

The Court: Well, what is the object?

Mr. Cochran: Well, the contract was for that and it was not done. Under my theory, it would be deductible.

The Court: It was partially for that.

Mr. Cochran: Yes, Your Honor—that was the whole theory.



(Testimony of W. M. Gillis.)

The Court: You had an opportunity upon cross-examination to go into those things——

Mr. Cochran: I was unable to prove it by Mr. Hite or by anybody else.

The Court: Well, you had this witness on the stand too, Mr. Cochran.

Mr. Cochran: He was on the stand, that is true. I have not called this witness before—I have only cross-examined, as to cross-examination.

The Court: Do you have any further testimony, Mr. Tanner?

Mr. Tanner: Yes, Your Honor.

The Court: Call your witness. [127]

Mr. Tanner: Call Mr. Gillis, please.

### Redirect Examination

By Mr. Tanner:

Q. Mr. Gillis, Mrs. Gillette has testified, I think, relative to a conversation, and as I recall, she alleged she had with you in the North Pole Bakery sometime in January and, as I recall, prior to the time you had stopped the work. Will you tell us about that conversation, please?

A. Well, I was in the North Pole—I was having a cup of coffee there, and I don't remember the words, but anyway, she came over and wanted to know about the work, and complained about this and that—about not getting the work done fast enough and, as she testified herself, I said, "Mrs. Gillette, I told you I did not want that job when I first



(Testimony of W. M. Gillis.)

talked to you, there is a shortage of labor—," and she said something to the effect that "your work has shown that"; that was prior to the time I quit the job.

Q. Now, calling your attention to the call that Mr. Gillette made upon you that you have heard him testify to, sometime the latter part of January, in front of your shop. Do you recall that incident?

A. Yes, sir.

Q. Will you tell us what took place?

Mr. Cochran: That is objected to as having been testified to. He testified to having told Ben Gillette in January that Mrs. Gillette had directed him to cease the work. This is not cross-examination—it is simply to get the last say on that.

Mr. Tanner: If the Court pleases, I think Mr. Cochran is [128] inferring from the reply that the conversation with Mr. Gillette was never gone into and was left until Mr. Gillis testified to the conversation.

Mr. Cochran: Well, I put Mr. Gillette on and asked him if he had such a conversation. Mr. Gillis has gone on the stand and denied it. Now, he wants to disregard what was said during that conversation. It is a question, it seems to me, of veracity between Mr. Gillette and this witness.

Mr. Tanner: Well, the inference is that I am attempting to strengthen the testimony which is not the case. I am simply putting him on for rebuttal.

Mr. Cochran: I am simply saying it has gone on before.

(Testimony of W. M. Gillis.)

The Court: Well, I don't recall any testimony occurring with relation to what Mr. Gillette testified to as having occurred on any definite date in January. It was early in January, according to one of your first questions and answers.

Mr. Cochran: The record shows that Mr. Tanner brought it out.

The Court: On the contrary, Mr. Gillette testified that his wife had told him nothing.

Mr. Cochran: And he also testified that he never had the conversation with Mr. Gillis. Gillis testified he had notified Gillette that he had stopped the work.

The Court: Well, Mr. Gillette testified he did not hear any such thing, and this is proper rebuttal then.

Mr. Cochran: Can I then again deny it by calling Mr. Gillette on the stand? [129]

The Court: Well, this witness has never had an opportunity to testify on that. He may answer the question.

Mr. Tanner: Tell us what that conversation was, Mr. Gillis.

A. Mr. Gillette came over and I spoke to him and he wanted to know when we were going to be back down to his job. And I said we were not going to be there.

Q. Why?

A. Because Mrs. Gillette had told us to forget the whole thing. He said, "Did she say that"? He went on talking about who would do the work and

(Testimony of W. M. Gillis.)

I think if I recall rightly, he might get Pete Satterlee.

Q. Now, calling your attention to the testimony that has been given relative to the flue; was that flue examined prior to your moving the house?

A. Yes, we took a look at it. As much as we could see of it, some of the blocks were loose. We took off—I don't remember whether we took off a tin jacket or not. I instructed them, if they were loose, to take them down. We took a look at what we could see in the basement and where we had to cut in the basement to make it ready to move. I debated somewhat in my own mind whether to take the flue down before moving or move it with the building, and I decided if it would go along all right, it would be less time and less money to move it. If not, we would have to do the best we could with it. Then—well, we started to move the building. When we pulled the building out, that probably fouled the braces there and that did sag the building that was below the floor line there, consequently, when we got the thing over there. However, they went on and moved on across and told the boys we would see what was wrong.

Mr. Tanner: And you tore the boards off sufficiently to look at the flue, did you, Mr. Gillis?

A. That is right; we took some of the boards off.

Q. Now, relative to the bracing of the house after you took the building and set it on its foundation, what was done?

(Testimony of W. M. Gillis.)

A. We put only temporary posts under the house. They were temporary braces because——

Mr. Cochran: Just a moment now. The questions should be answered by “yes” or not. These speeches are not part of the testimony.

The Court: Go ahead.

A. They were temporary because it was our intention to put in braces for the permanent one.

Mr. Tanner: And that would be naturally resting on the frozen ground below?

A. Yes, temporarily.

Q. What was the condition—now, speaking of the sump that you have heard testimony on—at the time you told the boys to haul in backfill for the basement under the instructions, what was the condition in the basement there?

A. There was water on the basement floor, in the barrel that had been sunk for the sump there. There was an electric pump there which had been pumping, and it seems to be soggy and wet down there.

Q. Do you know anything about the filling up of the sump?

A. I do know that the boys, when they filled in, found the [131] sump there.

Q. Now, relative to your original conversation with Mrs. Gillette, where did you first meet Mrs. Gillette, in reference to this work?

A. At the Masonic Hall.

Q. What part of the Hall?

(Testimony of W. M. Gillis.)

A. Well, we were in front of what is now the main temple before the front section of the building was moved in.

Q. And what was that conversation, as near as you remember?

A. I don't remember exactly. She introduced herself as Mrs. Gillette and made some comment about the work over there and—oh, I can't remember the exact conversation about it.

The Court: Well, this has been gone over before.

Mr. Tanner: Pardon me, Your Honor, I was thinking it had not been. Do you recall Mrs. Gillette having with her at that time Defendants' Exhibit 2?

A. I don't remember; it is possible she did have, although I don't remember.

Q. Upon—did you or didn't you give to Defendants' Exhibit One?      A. I did, yes.

Q. And tell us about Exhibit One and how you come to give it to the defendants?

Mr. Cochran: Just what is the purpose of that?

Mr. Tanner: To verify the terms of the instrument.

Mr. Cochran: If so, I object. It speaks for itself—it is irrelevant.

The Court: This has already been testified to——

Mr. Tanner: I don't think so, Your Honor. It was never raised [132] by the plaintiff at all. The Exhibit and everything was brought out by cross-examination and presented as an exhibit and referred to as a contract.

(Testimony of W. M. Gillis.)

The Court: This is Defendants' Exhibit One, is it?

Mr. Tanner: Yes, Your Honor.

The Court: You may ask the question.

Mr. Tanner: Will you tell us how you come to give that to the defendants?

A. As an approximate estimate of the work, as near as I could tell, so—as to what they wanted done at that time. If they had this plan here, which we don't remember, it was so very vague I did not connect it with the house. In fact, until it was brought up in Court, I did not know that this side addition here was to be put on at any time. My opinion was that the part that was added was the part which was to be put on. I went over there to look at the house, as Mr. Gillette testified, and he showed me through the basement and this section was to be put on there, which was a rampway or a walk. That was my picture of the house all the way. I did not know until this was brought up that that 8x30 addition was to go on the east side. I may have seen those plans, but I do not remember them, and there is a bare possibility that they were left in the shed where I was talking to Mrs. Gillette, but I did not base my approximate estimate on these plans, for the reason that there was not enough to go on, unless you know other things. I based it on what she told me about the house.

Q. Did you go over and look at the house?

A. Yes, I went [133] over to see approximately the size of it, where it was, what the conditions



(Testimony of W. M. Gillis.)

were, and several other things about it; I could not begin to give a figure from a plan like that.

Q. Now, what was your intended meaning at the time you wrote this over here? It states, "Complete new addition as shown."

A. Well, where they showed me the additions were to go. When I went to see the house, they showed me where they were to go. I was not sure about anything and they showed me approximately where they were to go. And they did not have any plans, or what I took for a plan, but I had nothing else I could work from unless they showed me at that time what it was they wanted done there.

Q. Now, Mr. Gillis, prior to the—what you call an estimate there, were you told in detail how everything was to be done? A. No, only generally.

Q. Calling your attention, Mr. Gillis, to the last sentence where it says, "Moving operations to be completed in October"; what did you mean?

A. At that time, I thought there was a chance we could complete it in October. That was purely an estimate, for the reason I could not estimate simply how long it would take. I had told her before that the work had to be worked in with other jobs and we would try and do it, and my approximate estimate of October was to take into consideration the other work that had to be done along with that. It was not simply a matter of moving one house; we had other work also and I could give only an approximate [134] time on that because you get fouled up on your time a lot of times.



(Testimony of W. M. Gillis.)

Q. Did you present that to the defendants—that it was to be a binding contract on you?

A. It was merely an estimate.

Q. Why did you present that estimate to the defendants?

A. To give them some reasonable idea of about what that much work would cost. As Mrs. Gillette testified, when I first talked to her, the subject was brought up about price—whether she asked me I don't know, or whether I said that I would make the statement I don't know, but I would much rather people would know approximately what something would cost them to have the work done; and a good many people do not realize the price of labor and material, and we would much rather have an agreement, so they would have an approximate idea, at least, of what the thing is going to run.

Q. Now, speaking of the forms, Mr. Gillis. There has been evidence, apparently attempting to discredit the work of tearing out the forms. Will you tell us why the forms placed by the defendants were torn out by you and other forms put in?

A. Part of the forms were in, but they were not ready for the concrete. They were not built—well, it would have taken us longer to have built—to have completed those, the way they were started, than it would to build the kind of forms we could put in there. It would take less money to do that, and the forms were not complete; at least, it did not look to me like it; and another thing, at [135] that time, Mrs. Gillette asked me to look that basement over.

(Testimony of W. M. Gillis.)

She said Mr. Harper had the forms too far toward Satterlees.

Q. Why was the cornice board not put back that you have heard testified to?

A. Because we were called off the job before we had it put back.

Mr. Tanner: That is all, Mr. Gillis.

Re Re-Cross-Examination

By Mr. Cochran:

Q. Now, Mr. Gillis, you say because you were pulled off of the job. Did you make any offer to replace this cornice?

A. Not after I was told that was all—not after Mrs. Gillette told me to let the whole thing go.

Q. When did you take it off?

A. I cannot say the exact date—whenever the house was moved.

Q. Was that September or June or July or August?      A. I don't remember for sure.

Q. You know you cut it off?

A. That is right.

Q. Before you moved it across the street?

A. Before we moved it between the building there and the telephone poles.

Q. But you don't know when it was?

A. No, I don't know the exact date.

Q. That was before October, wasn't it?

A. No, sir, I don't think so.

Q. You claim you were called off the job on the 16th of September?

(Testimony of W. M. Gillis.)

A. No. The 16th of December was the last work we billed them for. [136]

Q. Did you say that up to that time, you had not attempted to put on this cornice?

A. Not up to that time, no.

Q. Did Mrs. Gillette say not to put the cornice back?

A. She told me that would be all the work—to let it go.

Q. Now, the agreement says, "Complete new addition, as shown." Now, didn't you mean as shown right on this plat here? What did you mean, "as shown"?

A. As we were shown at the house what they wanted. That plat did not show.

Q. Did not show the addition?

A. Not the completed one.

Q. Well, there it is on the end.

A. There is no stairway there—no height.

Q. You knew what the height was, didn't you?

A. Well, I could make a guess, but it was not shown.

Q. And this was the approximate amount that you gave? Why didn't you put "approximate amount" on the agreement?

A. Because I didn't figure it to be a contract at all. It was merely an estimate.

Q. Well, why didn't you put "estimate" on it?

A. I didn't think it was necessary—I didn't have enough plans or specifications to figure a contract off of.

(Testimony of W. M. Gillis.)

Q. Now, did you see the Gillettes about this estimate?      A. I think I gave them that, yes.

Q. You went to their house, didn't you?

A. Yes, I think I did.

Q. And didn't you ask them whether to go on with the work?      A. We did, yes.

Q. Did they tell you to go ahead?      A. Yes.

Q. And then?

A. She told me when I first talked to her [137] that whatever the cost, to get it done, but to give a reasonable idea of approximately what that amount of work would come to, and I gave them that estimate. I think at that time they complained it was a little higher than they had figured the work would come to, but said to go ahead with it.

Q. Now, isn't it a fact that you talked over this plan?      A. It is possible, yes.

Q. And then you asked them if you should go ahead with the work?      A. That is right.

Q. And then they told you to go ahead and you started the work?

A. That is right. But you claim it was a contract—it was not even intended as a contract.

Q. Now, isn't it a fact that the addition shown upon this plat that was to be built—isn't it a fact that you went to them and told them you could not complete that until the following summer?

A. I think not. I think that was when she was over to see me, and when she went on with it, and I told her it might not even be completed until the

(Testimony of W. M. Gillis.)

next year because we did not have the materials.

Q. And then didn't they tell you if it could not be completed before the winter, they would not build it?

A. I don't remember that conversation.

Q. Do you remember their having dropped the building of this addition?

A. No, we built it on.

The Court: Are you speaking about the proposed original addition?

Mr. Cochran: That is right, Your Honor. [138]

The Court: You are speaking not of the porch then——

Mr. Cochran: No, Your Honor.

The Court: All right, go on.

Q. I did not even know that this addition was to be built. I only took notice of the approximate size when I went down there—I don't remember——

Q. Well, surely you remember what——

The Court: He says he does not remember the details. When you accuse a witness of something not true, you should be called for it. You then interrupted this witness when he was only about half through his answer.

Mr. Cochran: I realize that—the question was did you discuss with them the subject of not building that addition?

A. After they told me to go ahead with the work?

Q. Yes, after that.

A. If you are talking about this addition on this plat——

(Testimony of W. M. Gillis.)

Q. I am talking about the addition that you did not build.

A. Well, as I said before, up until this was brought up here this time, I did not realize that that was the addition they were talking about. The only one I knew about was the one they did build on there. She talked about a glassed-in porch and I told her we would have to make them and that that was an expensive proposition.

Q. And they abandoned that, didn't they?

A. They told us to go ahead with it. It was a room is what it was. It wasn't a porch even. [139]

Q. Well, did you put that on?

A. We did; we made them, yes, sir.

Q. Well, you did not have to wait until the following summer to do that?

A. Well, I told her that would not be available in town and that I would have to make them.

Q. And did you make them?

A. Well, I didn't know whether we could take time enough.

Q. Well, that is charged in your bill, isn't it?

A. Yes, sir, the three we did make.

Q. Well, there was no necessity to tell them that had to be delayed until the following summer, was there?

A. It was my opinion that they were not available in town if they put in those sashes.

Q. Who made the sashes?



(Testimony of W. M. Gillis.)

A. Well, what I am getting at whether they are shipped in or whether we make them.

Q. Yes, but you know special sashes in odd sizes don't come in manufactured? A. They don't?

Q. No, only the standard sizes are manufactured——

The Court: Are you arguing with the witness?

Mr. Cochran: No, Your Honor.

The Court: Well then, put it in the form of a question.

Mr. Cochran: I am just asking, isn't that true—only standard sizes are manufactured?

A. No, sir, you can order any size of sash you want from a sash and door factory.

Q. When was it that Mrs. Gillette came to see you at the Masonic Temple?

A. I do not know the day for sure—somewhere around the first of August. [140]

Q. This is dated the 8th—would that be it?

A. I think probably before that—I am not sure.

Q. And when did you next see the Gillettes?

A. Oh, I could not say for sure on that; probably the next day or two.

Q. Did you take this estimate, as you call it, down?

A. I don't remember, but maybe I did. I don't remember whether I gave them the estimate then or not.

Q. You had not been down to their place?

A. Not at that time—I think not.

Q. So that any approximation that you made



(Testimony of W. M. Gillis.)

was from conversation?           A. Yes.

Q. Then what do you mean by "complete new addition as shown"?

A. As shown according to the way they wanted it built.

Q. Well, you had not been down to the house——

A. No, I still did not know where they wanted the things until they showed me where they wanted them.

Q. Well, what do you mean by "as shown" if you did not have a plan?

A. Well, as they showed me.

Q. But you had not been down there, you said.

A. Well, I was on the job when we were putting the new addition on——

Mr. Cochran: That is all.

Mr. Tanner: If the Court please, I have one more witness; could we have a five or ten minute recess?

The Court: We will recess for ten minutes, yes. [141]

Mr. Tanner: Mr. Paterson, please take the stand?

HUGH F. PATERSON

Witness sworn.

Direct Examination

By Mr. Tanner:

Q. State your name, please.

A. Hugh F. Paterson.

Q. You are a resident of Nome?           A. Yes.

(Testimony of Hugh F. Paterson.)

Q. Are you a carpenter and builder?

A. Yes.

Q. How long have you been in that business?

A. About 38 years.

Q. You have had experience with concrete and cement, have you?      A. Yes.

Q. Understand it?      A. Yes.

Q. Mr. Paterson, did you have occasion, or did you see at any time the foundation—the concrete foundation poured for the Gillette residence?

A. I did.

Q. Did you observe it, Mr. Paterson?

A. I did.

Q. From your observation, would you say that was a standard pouring job?      A. I would.

Q. In the construction of forms for the basement that you have observed—the concrete basement walls—I think the testimony shows that it is about 24x30 feet—approximately what would you say would be required in nails for the construction of the forms and the runway for the pouring of the cement?

A. I think it would take about 200 pounds; that is, two kegs.

Mr. Tanner: You may cross-examine. [142]

### Cross-Examination

By Mr. Cochran:

Q. Mr. Paterson, how many nails in a pound?

A. I never counted them.

(Testimony of Hugh F. Paterson.)

Q. You have no idea? A. No.

Q. How many nails in a keg?

A. 100 pounds.

Q. How many?

A. 96 to 100 pounds, I am not sure.

Q. You don't have the number?

Mr. Tanner: Well, ask him the size; there may be different sizes——

Mr. Cochran: Well, he said there would be two kegs.

Mr. Tanner: You did not ask him the size.

Mr. Cochran: This was a concrete form that had been built before by Mr. Harper, I believe it shows——

Mr. Tanner: We are not talking about Mr. Harper's job, Mr. Cochran.

Mr. Cochran: Who placed those forms, do you know?

A. Mr. Gillis did, so far as I know.

Mr. Cochran: Scotty, what examination did you make of the pouring of these forms?

A. I was down past that way when they were pouring cement and I observed it then.

Q. What part of it did you consider standard?

A. It was all standard; it was a standard foundation.

Q. What is a standard foundation?

A. What is down underneath that house now.

Q. What do you mean by that Scotty?

A. Well, they are all built alike——

(Testimony of Hugh F. Paterson.)

Q. Well, what do you mean by that?

A. There are no different standard foundations.

Q. The form on the ground; is that correct?

A. I did not see it lying on the ground.

Q. Did you mean the foundation that the walls were on; is that it?

A. The foundation was on, and well braced. It takes a lot of braces and I did not see any bulges.

Q. Now, if concrete is poured on a standard base, is it presumed to crack?

A. Well, I have seen them crack; you mean the forms?

Q. It should not crack, should it?

A. Well, that would be something the matter with the ground—not the concrete.

Q. Shouldn't the ground be properly prepared when you pour the concrete on it?

A. I don't know who done the excavating there.

Q. If it had been properly prepared and the concrete was poured in the standard form, it should not have cracked, should it?

A. I don't know.

Q. Well, you are an expert, aren't you? I am asking you, if concrete is poured on the proper foundation, it should not be cracking, should it?

A. No, I don't think so.

Q. At least, within the course of a few months, should it?

A. That is a hard question to answer—to say yes or no to that.

Q. You don't know then?

(Testimony of Hugh F. Paterson.)

A. Yes, I have seen it crack, and when it did not. The foundation on my house outside is cracked.

Q. But did it crack the next day? A. No.

Q. There was a reason for it, wasn't there?

A. Not that I could see, not unless the ground settled some place where the concrete was on. [144]

Q. Well, then, the foundation was not properly tamped, was it?

A. That is probably what was the matter with it—there might not be enough excavation in it.

Q. Where the wall of a basement cracks and leaks water, is there any way of fixing that?

A. Concrete is porous; water will seep through it, unless you can buy stuff to mix in to make it water-proof.

Q. To mix outside?

A. No, right in the machine.

Q. And you can paint it?

A. Yes, you can paint the outside too.

Q. And that insures it against leaking?

A. Yes, generally.

Q. That is all, Scotty.

Mr. Tanner: That is all, Mr. Paterson, thank you.

The Court: Do you have anything further?

Mr. Tanner: We rest, Your Honor.

Mr. Cochran: No, Your Honor.

The Court: Do you wish to let the arguments go over until Monday?

Mr. Cochran: I would like to have Mr. Gillis

answer that question—the reason of the cost of the construction of that addition.

Mr. Tanner: I think the Court has made that a closed issue.

Mr. Cochran: Well, I have asked the Court to let me get the question answered. If it is not material, well I have no further evidence at this time.

The Court: I don't think it is material, for this reason—that the testimony is that it was a rough estimate and the conditions [145] now have changed. I don't see what bearing it would have on the foreclosure of this lien. I don't exactly understand your reason for wanting it answered.

Mr. Cochran: Well, I could state it, Your Honor. I could be very brief in the matter. Mrs. Gillette went to see the plaintiff in this case and stated what she wanted to have done. She furnished him with a plat as to what was to be done. He returned to them with a written statement, a contract, signed it, and put on the price, and subsequently came back and was asked to go ahead. That constitutes the agreement. The price is stated not approximately, but definitely, and just exactly what was to be done, and not to be done, in the handwriting of the plaintiff himself. Now then, the plaintiff says he did not complete the contract because he was told not to complete it. Now then, we are relying on the contract. The part he did not complete, as provided in the contract, he surely would not be entitled to anything for it. If he did not complete the contract for the price given them, then what he did not do



certainly should be deducted from any amount he should have coming.

The Court: Well, I think I understand that. However, this is asking him to do something now on a basis that isn't the original basis. In other words, if he had at that time—if the testimony showed that at the time when he made this contract, as you call it, he had figured in this item and that, with the moving and building of the foundation and the addition, [146] then we might go into that.

Mr. Cochran: That is right. They fixed the price for all of the work, including this addition specified in the contract. Now, he admits he did not do that work. Now should he recover for something he did not do that he agreed to do?

The Court: I don't know whether it would be very enlightening to the Court: It appears to me now that the case was closed, if there was a matter of the kind, it was a very light one, as to details——

Mr. Cochran: Well, it is all admitted.

The Court: On details? At the time of the original estimate?

Mr. Cochran: Well, I call it a contract.

The Court: I am speaking of both parties, at the time that amount was arrived at.

Mr. Cochran: They stated what was done and what was not to be done. They were asked to go ahead and furnish a complete contract and this written statement was furnished them. They accepted it and directed the plaintiff to go ahead; that is undisputed testimony.



The Court: There is no testimony as to details here; there is no testimony as to what did go into construction here.

Mr. Cochran: The plaintiff knew. The porch had been enclosed, as agreed, but this addition was not built. He figured those things out at the time he furnished these figures.

Mr. Tanner: If the Court please, if we are going to argue in detail, I would like to have an opportunity—— [147]

The Court: It is only this particular point—whether the witness, on cross-examination or rebuttal, should be asked to figure it out now.

Mr. Cochran: No, Your Honor, it was not on rebuttal. I called him as a witness. It was my direct case. I called him as a witness. Anyway, I stated my reason for wanting the question answered and I believe I am right or I would not make the contention.

The Court: Mr. Tanner?

Mr. Tanner: Well, as a matter of fact, Your Honor, it seems to me that this is asking the plaintiff in this case to answer matters which have never been asked for in the beginning, and he—as plaintiff testified here, it was an over-all picture of the job, and now to expect him to attempt to put himself back into the situation for the benefit of the defendants and attempt to figure in a detailed portion, I don't think it is fair. He stated that his estimate covered an over-all proposition.

Mr. Cochran: I don't care what it was he ad-

mitted. He did not do what he agreed to do. Now, if he did not do that, he is not entitled to any pay for it.

The Court: Now, suppose he testified to a certain figure, won't you be bound by your own pleadings, regardless? The question will be denied. I will hear your arguments Monday morning at 10 o'clock.

In the District Court for the Territory  
of Alaska, Second Division

REPORTER'S CERTIFICATE

United States of America,  
Territory of Alaska—ss.

I, Maude R. McAlee, Official Court Reporter for the hereinabove entitled court, do hereby certify:

That as such Official Court Reporter, I reported the above entitled cause, viz. W. M. Gillis vs. Ben F. and Irene Gillette, No. 3737 of the files of said court; that I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting; that the foregoing pages, numbered 1 to 148, both inclusive, contain a full, true and correct transcript of all the proceedings at the hearing of the above entitled cause, as to testimony of witnesses, to the best of my ability.

Witness my signature this 29th day of April, 1948.

/s/ MAUDE R. McALEE,  
Official Court Reporter, U. S. District Court, First  
Division, Territory of Alaska.

[Endorsed]: Filed January 30, 1950.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

United States of America,  
Territory of Alaska, Second Division—ss.

I, Norvin W. Lewis, Clerk of the United States District Court, Territory of Alaska, Second Division, do hereby certify that the foregoing Transcript on Appeal contains the original Complaint, Summons, Motion to make Definite and Certain, Detailed Statement of Account, Answer, Reply, Plaintiff's Exhibits "A," "B," "C," "D," and "E," Defendants' Exhibits "1," "2," and "3," Transcript of Testimony (original and one copy), Memorandum of Findings and Conclusions, Findings of Fact and Conclusions of Law, Judgment, Petition for Allowance of Appeal, Assignment of Errors, Order Allowing Appeal and Fixing Amount of Cost Bond, Cost Bond on Appeal, Motion for Extension of Time for Filing Transcript on Appeal, Order Extending Time for Filing Transcript on Appeal, Citation on Appeal (Lodged Copy), Praeceptum for Transcript of Record, Stipulation Re: Printing of Record, Copy of Order Remanding, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Cost Bond on Appeal, Motion for Extension of Time to File Transcript on Appeal, Order Extending Time to File Transcript on Appeal and Praeceptum-Designa-

tion of Record in the case of W. M. (Alias Bill) Gillis, plaintiff, vs. Ben F. Gillette and Irene Gillette, defendants, No. 3737 Civil this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of this Court this 3rd day of March, A.D. 1950.

[Seal]        /s/ NORVIN W. LEWIS,  
                 Clerk.

[Endorsed]: No. 12145. United States Court of Appeals for the Ninth Circuit. W. M. (Alias Bill) Gillis, Appellant, vs. Ben F. Gillette and Irene Gillette, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Alaska, Second Division.

Filed March 7, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Court of Appeals  
for the Ninth Circuit  
No. 12145

W. M. (Alias, BILL) GILLIS,

Plaintiff (Appellant),

vs.

BEN F. GILLETTE and IRENE GILLETTE,

Defendants (Appellees).

### STIPULATION

In Re: Plaintiff's Second Appeal.

It is hereby stipulated by and between the above-named parties that, in printing the papers and records to be used on the hearing on Appeal in the above-entitled cause, for the consideration of the United States Court of Appeals for the Ninth Circuit, the title of the Court and cause in full and

on all papers shall be omitted, except on the first page of said Record, and that there shall be inserted in place of said title on all papers used as a part of said Records the words, "Title of Court and Cause," and also that all indorsements on said papers used as a part of said Record may be omitted, except as to the Clerk's file marks and the admission of service.

Dated this 7th day of February, 1950.

W. M. GILLIS,

By /s/ C. C. TANNER,

His Attorney.

BEN F. GILLETTE,

IRENE A. GILLETTE,

By /s/ CHELLIS CARPENTER,

Their Attorney.

[Endorsed]: Filed March 7, 1950.

---

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY  
APPELLANT AND DESIGNATION OF  
RECORD CONSIDERED MATERIAL FOR  
REVIEW

In Re: Plaintiff's Second Appeal

I.

Statement of Points

The Trial Court erred—

1. In finding (or assuming) that a completed

agreement was entered into between the Plaintiff and Defendants.

2. In finding that by agreement the Plaintiff bound himself to move Defendants' building to its new location in October, 1946 (Court's Findings, Section III).

3. In finding that Plaintiff by agreement bound himself to complete Defendants' work for the sum of \$2,872.28 (Court's Findings, Section III).

4. In finding that Plaintiff's abandonment of the work was wilful and without cause (Court's Findings, Section III).

5. In finding that "as a separate agreement" the Plaintiff furnished materials to the Defendants (Court's Findings, Section IV).

6. In finding that the Plaintiff \* \* \* "in the latter part of January, 1947 \* \* \* then quit and withdrew from the premises" (Court's Findings, Section V).

7. In not making a finding that the Plaintiff at the Defendants' request performed 987 hours of work for the Defendants of the reasonable value of \$2,220.75.

8. In not making a finding that Plaintiff's lien was duly filed within the 90 day period immediately subsequent to the time he ceased to furnish labor and materials; and that the cost of filing same was \$1.95.

9. In not making a finding of a reasonable attorney's fee to be allowed the Plaintiff.

10. In concluding that the Plaintiff was not entitled to judgment of lien foreclosure (Conclusions of Law, Section I).



11. In concluding that Defendants are entitled to damages in the sum of \$917.25 (Conclusions of Law, Section III).

12. In not concluding that Plaintiff was entitled to judgment for labor performed and materials supplied in the total sum of \$1,746.83 with interest, costs of filing lien, a reasonable attorney's fee, and costs of action.

13. In not concluding that Plaintiff's lien was a valid, subsisting lien against Defendants' property for the work performed and the materials supplied.

14. In discharging Plaintiff's lien (Judgment, Par. 1).

15. In giving judgment to Defendants for the sum of \$391.13 and interest (Judgment, Par. 2).

16. In not giving judgment to the Plaintiff for the sum of \$1,746.83 with interest plus lien filing fee of \$1.95 plus a reasonable attorney's fee plus costs of action.

17. In not giving judgment of lien foreclosure against Defendants' property for the total sum found due the Plaintiff excluding interest.

## II.

Designation of Record Considered by the  
Appellant to Be Material for Review.

Note: In making the following Designation the Appellant assumes that inasmuch as this is a Second Appeal (and after the cause of First Appeal having been remanded) the Appellate Court will consider the First

Transcript on Appeal in connection with the Second Transcript on Appeal and without the necessity of the reproduction of the material included in the First Transcript.

The Appellant (Plaintiff below) considers the following to be essential for review in this Second Appeal:

1. Transcript on First Appeal.
2. Praecipe on Second Appeal dated and filed January 30, 1950.
3. Findings of Fact and Conclusions of Law dated and filed December 2, 1949.
4. Judgment dated and filed December 2, 1949.
5. Notice of Appeal dated and filed December 27, 1949.
6. Cost Bond on Appeal dated and filed December 27, 1949.
7. Order Extending Time to File Transcript on Appeal dated January 5, 1950, and filed January 9, 1950.
8. Stipulation in re Printing of Record dated February 7, 1950.
9. Application for Appellate Court to review Original Exhibits.
10. Order of Appellate Court (if made) Authorizing Review of Original Exhibits.
11. Transcript of Testimony Taken at Trial.
12. Plaintiff's Exhibit A introduced at trial (Daily Time Sheets).
13. Plaintiff's Exhibit B introduced at trial (Original Lien as Filed).

14. Plaintiff's Exhibit D introduced at trial (Carbon Copy of Bill for \$52.30).

15. Plaintiff's Exhibit E introduced at trial (Carbon Copy of Bill for Labor and Materials.

16. Defendants' Exhibit 1 introduced at trial (One Sheet with Printed Heading "Bill Gillis, Box 645, Nome, Alaska").

17. Defendants' Exhibit 2 introduced at trial (One Sheet Pencil Sketch of Ground Floor of Building).

18. Appellant's Concise Statement of Points on which he intends to rely and Designation of Record considered essential for consideration thereof.

Dated at Nome, Alaska, this 21st day of February, 1950.

/s/ C. C. TANNER,

Attorney for Appellant.

United States of America,  
Territory of Alaska—ss.

C. C. Tanner, being first duly sworn, deposes and says:

I am attorney for W. M. GILLIS, Appellant. On the 21st day of February, 1950, I deposited in the United States Post Office at Nome, Alaska, a sealed, air-mailed envelope, air mail postage prepaid, containing a true copy of the foregoing "Statement of Points Relied Upon by Appellant and

Designation of Record Considered Material for Review'' and addressed to Chellis Carpenter, Esq., 220 Montgomery Street, San Francisco 4, California.

/s/ C. C. TANNER.

Subscribed and Sworn to before me at Nome, Alaska, this 21st day of February, 1950.

[Seal]      /s/ NORVIN W. LEWIS,

Clerk of the District Court for the Territory of  
Alaska, Nome, Alaska.

[Endorsed]: Filed March 7, 1950.

At a Stated Term, to wit: The October Term 1949, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the thirteenth day of March in the year of our Lord one thousand nine hundred and Fifty.

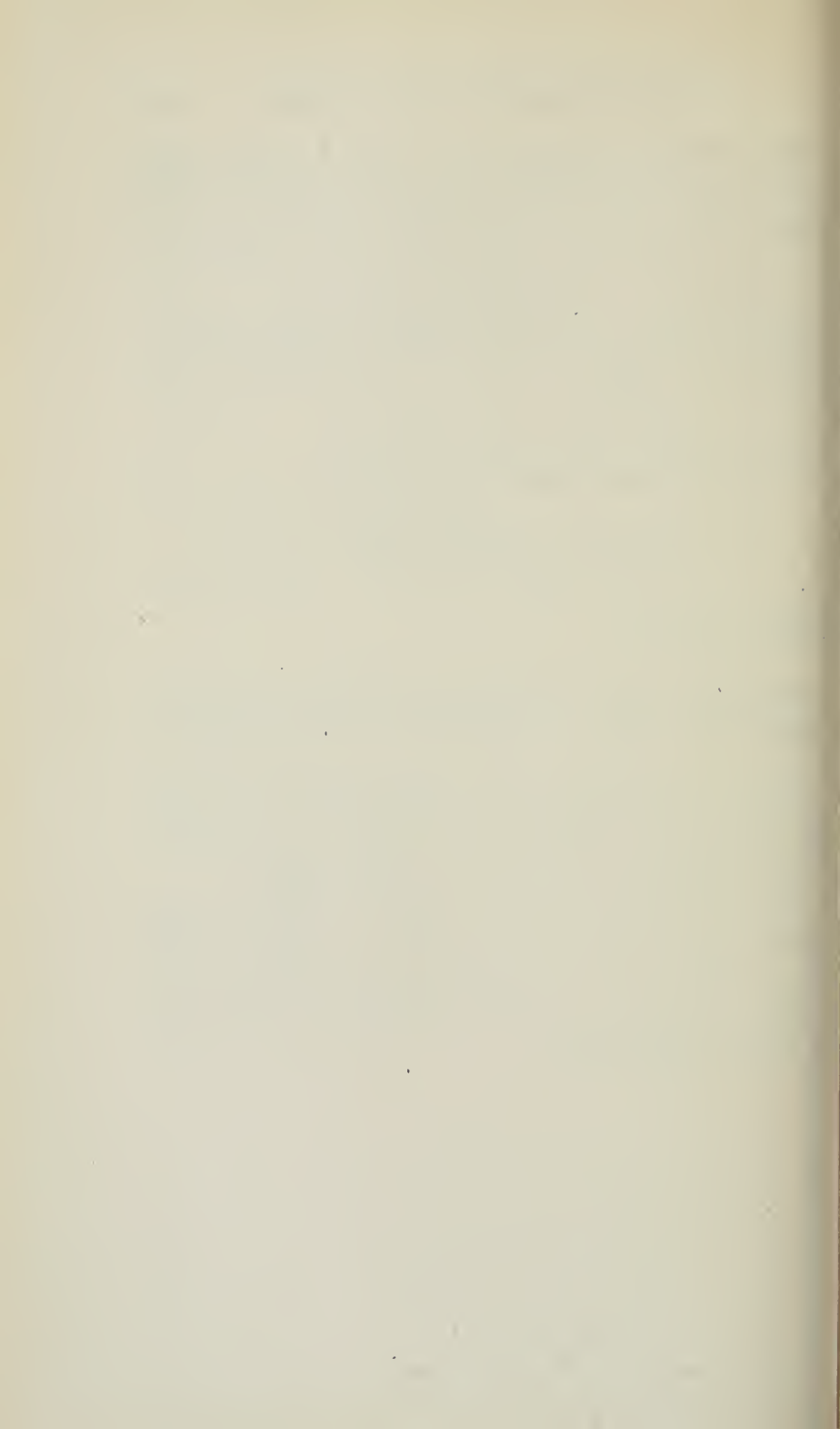
Present: Honorable Clifton Mathews,  
Circuit Judge, Presiding,  
Honorable Homer T. Bone,  
Circuit Judge.

[Title of Cause.]

ORDER THAT EXHIBITS NEED NOT BE  
REPRODUCED IN PRINTED TRANSCRIPT

Upon consideration of the application of the appellant and the stipulation of counsel for respective parties, and good cause therefor appearing,

It Is Ordered that the original exhibits transmitted as a part of the record on appeal in this cause need not be reproduced in the printed transcript of record but will be considered by the Court in their original form.



No. 12,145

IN THE

United States Court of Appeals  
For the Ninth Circuit

---

W. M. (alias Bill) GILLIS,  
*(Plaintiff) Appellant,*

vs.

BEN F. GILLETTE and  
IRENE GILLETTE,  
*(Defendants) Appellees.*

BRIEF FOR APPELLANT.

(Plaintiff's Second Appeal.)

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C. C. TANNER,

Box 27, Nome, Alaska,

*Attorney for Appellant.*

FILED

MAY 4 - 1950

PAUL P. O'BRIEN





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No. 12,145

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

W. M. (alias Bill) GILLIS,  
(*Plaintiff*) *Appellant*,  
vs.

BEN F. GILLETTE and  
IRENE GILLETTE,  
(*Defendants*) *Appellees*.

**BRIEF FOR APPELLANT.**  
(**Plaintiff's Second Appeal.**)

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**I. JURISDICTION.**

This action was brought in the District Court of the Territory of Alaska to foreclose a mechanic's and materialman's lien.

48 *U. S. C.* Sec. 101,

"There is established a District Court for the Territory of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. \* \* \*"

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(NOTE): Whenever emphasis is used in this brief, it has been added by the writer.

Compiled Laws of Alaska, 1933, Sec. 1994 (now C. L. A., 1949, Sec. 26-1-13),

“Actions to enforce the liens created by this code shall be brought before the district court, \* \* \*”

28 U. S. C. Sec. 1291,

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, The District Court for the Territory of Alaska, \* \* \* except where a direct review may be had in the Supreme Court.”

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## II. STATEMENT OF THE CASE—EXPLANATION.

Appellant, W. M. (alias Bill) Gillis, filed a lien on certain real property of the appellees, located in the Town of Nome, Alaska, and thereafter commenced an action to foreclose said lien under the provisions of Alaska statutes. Appellees answered and cross-complained, and appellant made reply.

The case came on for hearing by the Court, without a jury, on the 26th day of December, 1947. The Court reserved decision until the 29th day of March, 1948, at about which time a memorandum of findings and conclusions was served upon counsel for appellant. Counsel for appellees having died meanwhile, appellant's counsel applied on the 26th day of July, 1948, to the United States Court of Appeals for the Ninth Circuit for an alternative writ of mandate directed to the trial judge requiring him to make findings of fact, conclusions of law, and enter judgment or to



show cause why he did not do so. Said writ was issued and made returnable in the City of San Francisco. Thereafter, on the 27th day of August, 1948, the trial Court made and entered findings of fact, conclusions of law, and judgment. Appellant then took an appeal to the U. S. Court of Appeals for the Ninth Circuit (No. 12,145), mainly upon the contention that the trial Court's conclusions and judgment were not consistent with his findings of fact. Thereafter, an opinion was rendered by the Appellate Court and the case remanded to the trial Court with directions to enter further findings with leave to amend the conclusions and judgment to conform therewith. The trial Court made and entered further findings, conclusions, and judgment on the 2nd day of December, 1949. Appellant then took this appeal.

In this second appeal questions of fact arise which were not issues in the first appeal; therefore, emphasis in this brief will be placed upon the evidence introduced at the trial of the cause and points not covered in the former briefs filed. It is respectfully requested that this brief be considered in connection with and supplementary to the former briefs.

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### III. SUMMARY OF QUESTIONS INVOLVED.

It appears from appellant's statement of points in this second appeal (Transcript of Record, page 227) that the pertinent questions involved in this appeal may be summarized in the following manner:

1. Assuming the trial Court's findings to be true, are the conclusions reached and judgment rendered legally justified therefrom?

2. Does the evidence taken at the trial of this cause justify the conclusion reached by the trial Court that a completed contract or agreement was entered into between appellant and appellees wherein appellant bound himself to perform certain work and labor for the appellees within a specified time and for a definite consideration?

3. Does the evidence justify the conclusion reached by the trial Court that the appellant furnished materials and labor to the appellees by virtue of separate agreements?

4. Does the evidence justify the conclusion reached by the trial Court that appellant wilfully and without cause abandoned the work being performed for appellees?

5. Does the evidence justify the result reached by the trial Court that the plaintiff (appellant) is not entitled to compensation for labor performed?

6. Does the evidence justify the trial Court in disallowing a foreclosure of plaintiff's lien and a disallowance of attorney's fee and costs?

#### IV. ARGUMENT.

##### A. ANALYSIS OF COURT'S FINDINGS, CONCLUSIONS, AND JUDGMENT.

The Court found (Transcript of Record, page 44) that on August 8, 1946, agreement was entered into.

The testimony of plaintiff (appellant) Gillis and defendant (appellee) Mrs. Gillette agrees that August 8 was the probable date of their first negotiations and that negotiations continued for several days before plaintiff was authorized to do any work by virtue of these negotiations. (The testimony set out following this analysis makes this very clear.)

The Court found (Transcript of Record, page 44) that the plaintiff abandoned the work September 15, 1946, then again found (Transcript of Record, page 46) that in the latter part of January, 1947, "that he then quit and withdrew from the premises".

The uncontradicted testimony of Gillis (Transcript of Record, page 63) is that work ceased December 16, 1946.

The Court found (Transcript of Record, page 45) that "as a separate agreement" materials were furnished to the defendants by the plaintiff, then in the same paragraph finds that these materials were "actually furnished by the defendants."

*The Court fails to make any mention of the labor performed for the defendants.*

The Court states in his conclusions (Transcript of Record, page 50) that the plaintiff is liable in the sum of \$100.00 "for wantonly cutting off the corner

of defendants' dwelling house and wilfully failing to replace the same." Yet, in his original findings and conclusions (Transcript of Record, page 23) he finds "The plaintiff is *not* shown to be responsible for cutting off one corner of the dwelling house for which defendants claim One Hundred (\$100.00) Dollars."

In the trial Court's conclusions (Transcript of Record, page 50) he has repeatedly used the words "wantonly" and "wilfully". These terms are, in the main, not used in his findings nor were they used at all in his initial findings and conclusions filed in this Court on first appeal. (Transcript of Record, beginning page 20.) We believe this to be not only lacking of good form, but contrary to the evidence produced at the trial of the cause and that only one conclusion can be drawn from such action, namely, that the trial Court is attempting to show bad faith on the part of the plaintiff (appellant) and discredit his testimony before this Court. We submit that a careful examination of the testimony taken at the trial of this cause will show such inference unfounded.

**(1) Conclusions and judgment inconsistent with findings.**

Assuming for purpose of this analysis only that the trial Court's findings are true, the conclusions and judgment can not be justified. In effect, the Court has decided that, inasmuch as "plaintiff's abandonment of the work was wilful and without cause," he thereby not only loses any balance due him for labor under the alleged contract, but, in addition, he must *further enrich the defendants by paying them to complete the unfinished work.*

The defendants in their cross-complaint (Transcript of Record, page 14) claim only the difference between the alleged contract cost of labor and their alleged damages, and with no prayer for general relief. Counsel has been unable to find any legal or equitable support for the trial Court's arbitrary holding.

"If a party who agrees to perform services of labor abandons the contract after part performance, the other party may recover for any excess in the cost of doing the remainder of the work *over what he would have paid under the contract.*"

15 *Am. Jur.—Damages*, Sec. 45.

"generally speaking, *the motive of the defendant in breaking a contract is immaterial and cannot be inquired into on the question of compensatory damages.*"

15 *Am. Jur.—Damages*, Sec. 48.

## (2) Amount of damages inconsistent with evidence.

In the trial Court's Conclusions of Law, Paragraph III (Transcript of Record, page 49), we find damages have been awarded the defendants for failure to complete full concrete basement, \$327.50, and for leaving house unbraced, \$190.00.

Each award is not consistent with the evidence introduced at the trial of this cause. In the matter of the concrete basement, the defendants failed to establish the actual or reasonable value of the cement job. We quote from the testimony of Mr. Gillette under direct examination (Transcript of Record, page 173):



“Court. Just a minute—it seems to me that the reasonable value of this should come from one whose skillfulness and ability is established.

Mr. Cochran. All right. What was the size of the basement floor?

A. It was 24x30.

Q. And what thickness was the floor?

A. I put it down four inches thick—cement.

Q. Can you give me approximately the number of hours you put in in thawing, and the basement floor preparing to put in the cement, and putting it on? Putting the cement on?

A. Oh, about 160 hours.

Q. Do you know what is paid regularly in Nome for that character of work?

A. *I don't know.*”

*The record fails to disclose any other competent evidence to establish the value of doing the cement work.*

Following we quote testimony in the matter of costs for bracing house (‘Transcript of Record, page 176):

“Court. The question was how much does that bill show for putting in the posts.

A. 47 hours at \$1.75 an hour.”

Therefore, *the actual cost of this job was \$82.25.* The only other testimony in respect to this item of damages was given by Mrs. Gillette (‘Transcript of Record, page 140). We respectfully invite the Court to turn to this testimony to get further light in respect to damage award errors made by the trial Court.

The foregoing is considered sufficient to suggest that in making the awards the trial Court has taken his

figures from the figures set out in defendants' cross-complaint (Transcript of Record, page 12) and *not from the evidence.*

---

## B. THERE WAS NOT A COMPLETED AGREEMENT.

### Negotiations.

### Defendants' Exhibits 1 and 2.

A careful reading of the transcript of testimony in this cause (Transcript of Record, beginning page 59) will show that the only written evidence upon which the trial Court could possibly base his findings of a completed contract or agreement are defendants' exhibits 1 and 2. It is submitted without further argument or proof that these exhibits considered by themselves cannot by any legal stretch of the imagination be deemed a contract, although defendants' counsel throughout the trial of the action contended so.

Original negotiations in this matter were between defendant, Mrs. Gillette, and plaintiff, Gillis. We will let them speak for themselves.

Direct testimony of Mr. Gillis (Transcript of Record beginning page 61):

“A. On or about August 8th, I was working on the Masonic Temple over there and Mrs. Gillette came over to see me there and talked to me about this job. I told her at the time that we did not have time to do it. She was quite insistent about it, and said they had to get off of the beach and one thing and another, and I explained to her that we had contract work that we had to do and that we couldn't do it—that we simply had too much



on the schedule, and that with the labor conditions as they were at the time, it was almost impossible to get men and that we did not have enough men. Later she talked to me about it and I told her if we did it at all, *it would have to be done between other jobs, but that I would try to get the house off of the beach before the fall storm; but outside of that—well, we could not drop other work and go ahead with that.*

Q. You were under contract, were you, at that time, for other jobs?

A. I was.

Q. Well, go ahead, Mr. Gillis, and tell us about any other negotiations prior to that time.

A. They wanted to know approximately what it would cost. I could not furnish them the exact cost. *I gave them an approximate cost on it which at that time, they thought was too much. They did say they would have the forms in ready for me to pour when we were ready. I told them if it could be worked out so it was ready, I could work the same crew. She said they would have the forms ready. Well, we waited quite awhile, but the forms were not ready and finally I went to Mr. Gillette and asked him what the score was going to be on it and he advised us to go ahead and put in the forms and go ahead with the job, which we did.*

Q. Did that necessitate taking out other forms?

A. Yes, we had to take those forms out and rebuild.

Q. Prior to that time, were you given the order to go ahead on the work?

A. Yes.

Q. By whom?

A. By Mrs. Gillette.

Q. When did you commence the work?

A. Approximately September 10.

Q. About when services—at the time of the original negotiations, was there anything said about materials for doing the job?

A. Yes, that was one of the items. *I told Mrs. Gillette we could not furnish the materials—they were very scarce in town. However, she told me that practically all the materials were on the job and they would furnish them if we would go ahead with the work.*

Q. You have alleged indebtedness of the defendants for certain materials. What, in a general way, are you claiming for materials?

A. *There were certain materials we were able to furnish.*

Q. Now, Mr. Gillis, those were materials which had not been available on the job?

A. Yes.

Q. And you were authorized to furnish these, were you, Mr. Gillis?

A. That is right."

Cross testimony of Mr. Gillis (Transcript of record beginning page 82):

"Mr. Cochran. On the 8th day of August, Mr. Gillis, Mrs. Gillette came to see you, I believe you stated?

A. As near as I remember, that is correct.

Q. On the 8th day of August; and she came to see you about moving the house they were living in. She wanted it moved across the street on the lot that they had purchased there; is that right?

A. That is right.

Q. Were you acquainted with Mr. Gillette?

A. No, I had heard the name, but did not know who he was.

Q. Did you know anything about Mr. Gillette's physical condition?

A. Someone told me he had hurt his leg.

Q. And was he on crutches?

A. I heard someone say something about it, but did not know anything about it.

Q. Now, when Mrs. Gillette came to see you, she came to see about getting the building moved from the south side to the north side of Front Street; is that correct?

A. That is correct, yes sir.

Q. And did she talk to you and anyone else, or just to you alone?

A. As I remember, there was no one else there at the time.

Q. That was at your place of business?

A. No, it was at the Masonic Lodge.

Q. Did you tell her that you would consider the matter or anything of that kind? Just what did you tell her?

A. As near as I can recall, I said we could not take on the work; that we had too much work and did not see how we possibly could do it, with the labor situation as it was.

Q. And you told her you could not do the job?

A. I told her I could not possibly do it at that time.

Q. Did you enter into writing at that time? The 8th of August?

A. The first time I talked to her about it, I entered into no writing. I don't know whether it was the 8th of August or not.

Q. Mr. Gillis, I will show you a photostatic copy. Is that one of your bill headings?

Mr. Tanner. If the Court please, let's have the original.

Mr. Cochran. If the Court please, I will in due time.

Mr. Tanner. Well, it seems to me there was some agreement entered—don't answer that question relative to the photostatic copy until the Court makes an order——

Mr. Cochran. I am going to use the original, Your Honor. Please examine the statement, and the writing, I am now handing you—and is that on your bill-heading? Is that your handwriting?

A. I imagine it is, yes.

Q. Did you give this to Mrs. Gillette?

A. I imagine I did—one or the other, either Mr. or Mrs. Gillette.

Q. Is that your handwriting?

A. I think it is.

Mr. Tanner. Check it over carefully and be sure, Mr. Gillis.

Mr. Cochran. Yes, I want that done too——

A. I would say that was my handwriting.

Q. Do you remember giving that to Mrs. Gillette?

A. Yes sir.

Q. On that date?

A. I don't remember the date.

Q. That is the correct date as to when it was made out—is that correct?

A. I could not swear to that.

Mr. Cochran. Now, I would like to have this marked for identification. I will offer this in evidence, Your Honor.

Court. You have had a chance to see it, have you, Mr. Tanner? Have you any objection?

Mr. Tanner. No, Your Honor.

Court. Very well. It may be admitted as defendant's Exhibit No. 1.

Mr. Cochran. Now, that statement shows 'pouring a basement'?

A. That is right.

Q. And to move the house?

A. That is right.

Q. And to complete addition to the house, as shown by a map?

A. Yes sir.

Q. You had a plat at that time, did you?

A. No sir.

Q. What did you mean then, 'Complete new addition as shown'?

A. Well, they said they had a sketch and they told me they wanted the corner of the house filled out.

Q. Did you see the sketch?

A. I think at one time I did.

Q. Does this have reference to that sketch?

A. I could not say as to that.

Q. In this, it is provided you should do no work on the interior of the old house?

A. That is right.

Q. And you were to do no plumbing?

A. That is right.

Q. No wiring?

A. That is right.

Q. No painting?

A. That is right.

Q. And all materials to be furnished by the owners?



A. That is right.

Q. And the moving was to be completed in October?

A. That is right, as near as I understood.

Q. And the price was to be \$2872.28?

A. *That was approximately as near as I could figure it at that time.*

On the 26th day of December, at 1:30 P.M., the following proceedings occurred:

Court. You may proceed in this case, Mr. Cochran——

Mr. Cochran. Yes, I am ready, Your Honor. Now, Mr. Gillis, at the time that this paper was given to Mrs. Gillette, was there a sketch of the premises—that is, what was to be done?

A. I don't know. I don't remember seeing it if there was.

Q. Well, Mr. Gillis, refresh your memory if you will, please, and see if that was given to you at the time Mrs. Gillette talked the matter over with you——

A. It was never given to me—anyway, I don't remember; it might have been given to me, but I don't remember it.

Mr. Cochran. I ask that it be entered for identification——

A. I don't remember it——

Q. Didn't you have the sketch at the time you figured on the price when you made this written statement?

A. I don't remember the sketch. I may have seen it at the time we were talking about it. It may be the one or a different one, so far as I know.

Mr. Cochran. Please mark it for identification (to clerk). Have you any sketch that you made at the time?

A. I have none.

Q. At the time Mrs. Gillette came to see you, when you were working on the Masonic Temple Building, she explained to you what they desired to have done, didn't she?

A. Approximately, yes.

Q. And were you familiar with the building at the time she talked to you?

A. I was not.

Q. Did you familiarize yourself with the building subsequently? After that time?

A. Yes sir. Yes, I took a look at it.

Q. The building extended back from Front Street over the beach sand—is that correct?

A. Yes sir."

Gillis, cross-examination continued (Transcript of record, beginning page 89):

"Q. And you understood specifically that you were not to do any work inside the old house—any carpenter work in the old house?

A. Yes.

Q. And it was specifically understood that you were to do no plumbing?

A. That is right.

Q. And no wiring?

A. That is right.

Q. And also specifically understood you were to do no painting?

A. That is right.

Q. And also understood that all materials were to be furnished by the defendants?



A. That is right.

Q. You were definite in stating that situation?

A. Yes, because we could not furnish the materials.

Q. And that was one of the reasons you were definite about it?

A. That is right.

Q. Then you said that the moving operations would be completed in October?

A. Approximately at that time; we thought then it could be done in October.

Q. You did not make any specifications?

A. The specifications were made when I talked to them.

Q. And the price for which you were to do that and complete the work was \$2872.28?

A. *That was approximately the labor cost for the job.*

Q. Did you put it on this statement—that it was ‘approximately’?

A. I did, I think.

Q. Give me the statement. Is that—did you put on the statement it was the ‘approximate cost’ or the ‘cost’? *Were they told that that would be the approximate cost?*

A. Yes.

Q. Why didn’t you put down it would be the ‘approximate cost’ on that? Why didn’t you write in that word?

A. *Because I did not consider that a contract. It was an approximate estimate.*

Q. *Well, did you tell them it was an approximate estimate?*

A. *That is right.’’*

Direct testimony of Mrs. Gillette (Transcript of record, beginning page 125) :

“Q. When did you negotiate with Mr. Gillis with reference to moving this building?

A. On approximately the 8th of August. I presume it might have been a couple of days before.

Q. Where was he when you saw him?

A. I went to the Masonic Temple and there were a lot of men working there, and I asked for Mr. Gillis and told him I wanted to see him about doing some work; and he said, ‘Come in my office’, and I had no conversation with him whatever in the Masonic Temple or at the door. He did not know at that time what it was I wanted done. I asked him if he could do some work and he said he was very busy and did not know how he could do it; and I said, *‘Since Ben just came out of the hospital’—well, I rather coaxed him to do it and he didn’t say he wouldn’t.* He said, *‘I’ll take this sketch and give you a cost on it’, but we were not interested in the cost, and wanted the house taken care of;* and I said *‘You have been recommended to us and I don’t think I need any figures.’* But he said, *‘We always insist on doing that’,* and I said *‘OK’.* In a day or two—I don’t remember where I was, he brought back my sketch and brought back figures, and gave it as exhibited there.

Q. I hand you Exhibit No. 1 and ask if that is all Mr. Gillis gave you?

A. That is absolutely all.

Q. Does that embody the things he was to do?

A. That is the way we understood it.

Q. And the price?

A. That is the price.

Q. I hand you defendant's Exhibit for identification, Exhibit No. 2, and ask you to examine it and state whether or not that is the plat that you refer to as having given to Mr. Gillis when you first saw him?

A. That is right, it is.

Q. And on the subsequent day, did—when he gave you Exhibit One, did he return to you this plat?

A. That is right, he did.

Q. Had that been changed in any way?

A. Not a bit.

Mr. Cochran. Now, I intended to have a larger plat of this made, Your Honor. However—now, Mrs. Gillette, will you just show the Court what additions on this plat—what was to be put on the building?

Court. I think I understand it.

Mr. Tanner. Frankly, we would like to see that too.

(Defendant pointed out to the Court the work that was to have been done.)

Mr. Cochran. Did he build the addition on the west end?

A. No.

Q. And that extended the full width of the house?

A. That is right.

Q. Is that what is referred to in the memorandum that we gave you, 'to complete the addition as shown'?

A. I would say so.

Q. And that was not completed at all?

A. No sir.

Q. And nothing was done on it?

A. No.

Q. Why?

A. *Because I told him we were not ready to do it yet. He came down to ask us if we were going to let him do our work and I said yes, but we were not going to put on the 8x30 part; we just wanted the 7x17 porch made into a dining room. We did not say anything about reducing the price at that time.*

Q. Did the price of \$2872.28—did that include building this 30 foot addition?

A. Sure.

Q. And you told him he need not build that?

A. That's right.

Q. Now, what did he build onto the building?

A. He enclosed one wall, 17 feet. He finished the end of that porch, 7 feet, by roughing it in, and put the asbestos shingles on, and the black celotex was partly on inside. It was never finished. Mr. Metrovich had to put some on when they were trying to warm the place up. There was a rough floor put in, and there was the beginning of a partition because he understood the stairway was to go from the hall space; they were to be put in exactly as they were, and I believe—I cannot recall anything else—the windows were to be in—when we did not put the back piece on, those windows and doors were put on.

Q. It was specified that no interior work on the whole house was to be done?

A. That is right.

Q. And no plumbing?

A. That is right.

Q. And no wiring?

A. That is right, no wiring.

Q. And all material furnished by you?

A. Yes. He came to us several times to ask if it was all right for him to buy it, and we said it was OK.

Q. Now, Mrs. Gillette, this states moving operations are to be completed in October. Were you definite about the time it was to be completed?

A. *Well, we know the storms occur in October, and he put that on himself, and he put that in of his own free will.*

Q. Did you make any specification about when it was to be completed?

A. I wanted it by the end of October, when we talked about putting on the 8x30 piece and he said he would not be able to complete that until the—next spring, and I said it was OK. He could not finish the interior, he did not have time, and would have to leave that perhaps.”

Mrs. Gillette, direct testimony continued (Transcript of record, beginning page 129):

“Q. How long did he tell you it would take to move the house?

A. *He did not tell me.”*

(Transcript of Record, page 130.)

“Mr. Cochran. Did you ever have any other understanding with Mr. Gillis, with reference to the moving of your house other than is stated in this memoranda which he gave you under date of August 8, 1946?

A. Do you mean—any other agreement or understanding?



Q. Yes. Did you ever have any other understanding with Mr. Gillis about the moving of the house?

A. No."

The following day, December 27, 1947, Mrs. Gillette on direct examination testified as follows (Transcript of record, beginning page 137):

"Q. Now, Mrs. Gillette, going back to the time that you were given this statement of Mr. Gillis, on the 8th day of August, was—when was that given to you?

A. Approximately a day or so after it was dated, which I don't know if it was the same day or the next day—three or four days from the time I talked to him anyway.

Q. Where did he give it to you?

A. It was in the Nome Motors office.

Q. What did he give you at that time?

A. He handed me the contract and the plan.

Q. Had that original plat or plan that has been offered in evidence—had that been altered or changed in any way?

A. No.

Q. Had you discussed that thoroughly with him before it was given to you?

A. *I would not say 'thoroughly'.*

Q. Just what did you discuss with him, Mrs. Gillette, as to what was to be done?

A. Well, I did not discuss it a great deal. It was marked quite plainly and we told him that was what we wanted done.

Q. I believe you testified that Mr. Gillis came subsequently and asked about the work, did you, Mrs. Gillette?

A. *He came two or three days later and said, 'Did you folks decide to let me do your work?'*

Q. Was Ben there?

A. Yes, he was there.

Q. Had you shown it to him?

A. Yes, I had, and talked it over.

Q. He did not come inside?

A. Just poked his head in the front door——

Q. What did you and Ben say about his going ahead?

A. We said yes, but we were not going to have the 30x8 built on. The plat showed what we were not going to have done. *We did not discuss the price* and thought we would never have any trouble with the contract.

Q. What did Mr. Gillis say with reference to the addition to be put on, the 8x30?

A. He did say, when he handed me this plan back and the contract, he said he might not be able to do the inside finishing on the 8x30 until spring. That was the main reason why we did not have it done, because we thought we would be torn up probably through the cold weather or something.

Q. What was the date when Mr. Gillis asked you to get out of the house?

A. *It was the morning of the 15th of October."*

Cross-examination of Mrs. Gillette (Transcript of record, beginning page 149):

"Mr. Tanner. Mrs. Gillette, during the storm of '45, of course your building was placed in a kind of precarious position, wasn't it?

A. Well, the bulkhead was washed out——

Q. Well, it placed it in a bad condition, didn't it—damaged possibly?



A. Sure.

Q. And that was your reason for being very anxious to get it moved?

A. Of course; that is right.

Q. Now, prior to seeing Mr. Gillis, you had had Mr. Green working on it, had you?

A. That is right.

Q. And that was when you had part of your basement dug out?

A. Yes.

Q. And he had gotten quite a bit of lumber?

A. He had ordered 6400 and some feet of lumber.

Q. Yes. Why didn't Mr. Green continue with the work?

A. He said he could not get the work done properly. His best man was on a long drunk and he said he did not see how he was going to be able to do it.

Q. And he said he would gladly pay you for any damages that may have been caused?

A. Yes——

Q. You did not have any contract with him to do the work?

A. *We did not, no.*

Q. Then after that, you go and see Mr. Gillis?

A. That is right.

Q. *And upon recommendation of friends, and so on, as to his reputation?*

A. Yes.

Q. In other words, he had a good reputation?

A. One man had told us so.

Q. In other words, as far as you could learn, he had a good reputation?

A. Well, I would rather not go into that.

Q. Well didn't you say that?

A. This one man told us that.

Q. Now, Mrs. Gillette, when you go to see Mr. Gillis the first time, he is in the Masonic Building?

A. Yes.

Q. And you speak to him at the door first?

A. I asked for him.

Q. And introduced yourself at the door, is that right?

A. Yes.

Q. And in your first conversation with Mr. Gillis, he objected to the work on the ground that he could not do it?

A. Yes, he said he was too busy.

Q. And then of course you were very anxious that it be done, weren't you?

A. That is right.

Q. And so, in a sense, you put up an argument for him to do it?

A. Well, that is a natural thing, isn't it?

Q. But you were very anxious to have the work done under the circumstances?

A. Yes, that is right.

Q. And so you went into his shop then to discuss the matter?

A. That is right.

Q. And you state that you had this little plan?

A. Yes, I did; otherwise he would not know what to tell me.

Q. Well, that was not a very good plan, was it?

A. It was as good as I could do.

Q. Prior to that time, you had given it to Mr. Green?

A. No, Mr. Green talked us into selling that house and getting a new one.

Q. And you were going to build a new home at that time?

A. Well, if we had sold this one.

Q. At any rate, Mrs. Gillette, you only considered this a rough sketch as to how you thought you would improve the old building?

A. Well, it looks rough, but it is very definite and the house shows it now, finally, with that little porch enclosed.

Q. Well, have you a bill of particulars as to just what kind of material was to be used?

A. *No, we do not.*

Q. In other words, that was to be left to your instructions?

A. I don't know that anything was said about it—you don't have a room built on with a bunch of holes in it——

Q. Well, Mrs. Gillette, there are a lot of ways to build an addition?

A. Well, we agreed to furnish the material.

Q. Then, there was nothing discussed with Mr. Gillis relative to the kind of materials that would go into the building?

A. *No, there was not.*

Q. In other words, that was left to your instructions?

A. On the contract it says so.

Q. And you were assuming it was a contract?

A. It was, as far as I was concerned.

Q. *So you had no details on the matter, except this little sketch of yours?*

A. *That is right.*

Q. And at the time when Mr. Gillis told you he was tied up with work and that he could not see his way clear to do it, you told him, of course,

that you had the materials and would furnish them, didn't you?

A. *Well, I did not know what we needed myself—I changed my mind several times.*

Q. But you did know, however, that you wanted the building moved and a general idea of what you wanted done?

A. Well, it was right there on that sketch what I wanted.

Q. Now, Mrs. Gillette, after outlining the work that you anticipated and wanted done in the emergency, didn't you ask Mr. Gillis what he thought the approximate cost of that would be?

A. No, I was too anxious to have the work done.

Mr. Tanner. Now, Mrs. Gillette——

Court. Now, please don't argue back and forth——

Mr. Tanner. Well—so you said you did not ask for any estimate at all?

A. I did not, Mr. Tanner—I have already testified to that.

Mr. Tanner. *Nor did you ask for a contract?*

A. *No sir, I did not.*

Q. Under your ideas, and so on, Mr. Gillis was to have nothing to do with the plumbing, was he?

A. No sir.

Q. And I understood you to say that Mr. Gillis did not tell you how long it would take to move the building?

A. It says on the exhibit there that it would be——

Q. I said, did he tell you—and I will ask you if this is true, you said he did not tell you how long it would take?

Mr. Cochran. I object to that. He put it that she did testify. That is assuming something that is not true——

Court. Well, don't argue about it——

Mr. Tanner. All right. Did you or didn't you state on your direct examination that Mr. Gillis did not tell you how long it would take to move the house?

A. *Well, he did not tell me.* He did not discuss this except what he wrote on that paper——on the exhibit."

Mrs. Gillette, cross-examination continued (Transcript of Record, beginning page 162):

"Q. Now, you told us under direct examination that at one time you claimed you saw Mr. Gillis in January.

A. Yes. He was sitting at the counter at the North Pole, and we did very meekly ask him when he would get at our house. We just sat at the table and asked him how he was getting along with it.

Q. Well, you say you were very meek about it——

A. Well, the only time I got mad was when he said, 'Well, I didn't want to do it any way', and I said, 'I am well aware of it'; I never got mad before.

Q. All of the time that you were so meek, during that time, you knew that the contract had been broken?

A. *Well, I did not say that—what you call a contract, I did not know that it was broken; as far as I was concerned, it wasn't.*

Q. In other words, Mrs. Gillette, you did not consider your——what we call an estimate, you did



not consider moving operations to be completed in October as a violation of contract when they weren't, did you?

A. *Well, I was not even thinking that way.* I intended to pay every cent of that \$2800 as soon as the work was finished. I could have had fourteen people as witnesses if I had had any intention of a broken contract, or had known there would be a broken contract."

Re-direct examination of Mr. Gillis (Transcript of Record, beginning page 206):

"Court. This is Defendants' Exhibit One, is it?

Mr. Tanner. Yes, your Honor.

Court. You may ask the question.

Mr. Tanner. Will you tell us how you come to give that to the defendants?

A. *As an approximate estimate of the work, as near as I could tell, so—as to what they wanted done at that time.* If they had this plan here, which we don't remember, it was so very vague I did not connect it with the house. In fact, until it was brought up in Court, I did not know that this side addition here was to be put on at any time. My opinion was that the part that was added was the part which was to be put on. I went over there to look at the house, as Mr. Gillette testified, and he showed me through the basement and this section was to be put on there, which was a rampway or a walk. That was my picture of the house all the way. I did not know until this was brought up that that 8x30 addition was to go on the east side. I may have seen those plans, but I do not remember them, and there

is a bare possibility that they were left in the shed where I was talking to Mrs. Gillette, but I did not base my approximate estimate on these plans, for the reason that there was not enough to go on, unless you know other things. I based it on what she told me about the house.

Q. Did you go over and look at the house?

A. Yes, I went over to see approximately the size of it, where it was, what the conditions were, and several other things about it; I could not begin to give a figure from a plan like that.

Q. Now, what was your intended meaning at the time you wrote this over here? It states, 'Complete new addition as shown'.

A. Well, where they showed me the additions were to go. When I went to see the house, they showed me where they were to go. I was not sure about anything and they showed me approximately where they were to go. And they did not have any plans, or what I took for a plan, but I had nothing else I could work from unless they showed me at that time what it was they wanted done there.

Q. Now Mr. Gillis, prior to the—what you call an estimate there, were you told in detail how everything was to be done?

A. No, only generally.

Q. Calling your attention, Mr. Gillis, to the last sentence where it says, 'Moving operations to be completed in October'; what did you mean?

A. At that time I thought there was a chance we could complete it in October. That was purely an estimate, for the reason I could not estimate simply how long it would take. *I had told her before that the work had to be worked in with*



*other jobs and we would try and do it, and my approximate estimate of October was to take into consideration the other work that had to be done along with that. It was not simply a matter of moving one house; we had other work also and I could give only an approximate time on that because you get fouled up on your time a lot of times.*

Q. Did you present that to the defendants—that it was to be a binding contract on you?

A. *It was merely an estimate.*

Q. Why did you present that estimate to the defendants?

A. *To give them some reasonable idea of about what that much work would cost. As Mrs. Gillette testified, when I first talked to her, the subject was brought up about price—whether she asked me I don't know, or whether I said that I would make the statement I don't know, but I would much rather people would know approximately what something would cost them to have the work done; and a good many people do not realize the price of labor and material, and we would much rather have an agreement, so they would have an approximate idea, at least, of what the thing is going to run."*

#### (1) Comment.

It is evident from the foregoing testimony that negotiations began probably August 8 (1946) and that plaintiff was not authorized to do any work until several days after; that defendants did not want a contract; that defendants' Exhibit 1 is an outline of the work discussed in original negotiations and an estimate of the labor cost; that when defendants' Exhibit

1 was left with defendants, the plaintiff had no intention that it was to form the basis of a binding contract, and that he told the defendants it was an estimate—(a fact never denied by defendants): That when plaintiff was ready to pour cement (about Sept. 10) the defendants did not have their basement and forms ready as they had stated they would have, and without any further negotiations except for defendant, Mr. Gillette, to ask plaintiff, Gillis, why he didn't go ahead and prepare the basement and forms, the plaintiff did so: That as the work progressed defendants changed their minds several times as to what they did or did not want done: That the plaintiff in performing work for defendants from time to time furnished materials and did work not anticipated during original negotiations, and merely upon the sanction of the defendants, and that throughout, *no mention was ever made of a contract. Mrs. Gillette by her own testimony did not consider the failure of plaintiff to have the house on its new foundation during the month of October a breach of contract, nor did she consider a contract broken at all as late as the month of January following cessation of plaintiff's services (Dec. 16).*

It is submitted that it was never the intention of the parties that defendants' Exhibits 1 and 2 were to form the basis of a binding contract or agreement and that no such agreement was ever entered into.

**C. LABOR AND MATERIALS WERE NOT FURNISHED BY  
VIRTUE OF SEPARATE AGREEMENTS.**

The testimony set forth herein just above under B clearly shows that, in order for the plaintiff to perform the work discussed in original negotiations, it was necessary that extra work be done and materials supplied: That the plaintiff performed the extra work and supplied materials not by virtue of any contract or agreement with the defendants but merely with their consent and approval: That the plaintiff did all this in good faith to accomplish for the defendants desired results. The actions of all parties deny that it was the intention of the parties that a binding agreement was in effect.

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**D. PLAINTIFF DID NOT WILFULLY AND WITHOUT  
CAUSE ABANDON WORK.**

During the trial of this cause Gillis repeatedly testified that he stopped performing services for the defendants by reason of order from Mrs. Gillette given on or about the 16th day of December (1946) (Transcript of Record, pages 63, 93, 106, 209, 210). *This testimony was corroborated by George Newton.* (Transcript of Record, page 118.)

Mrs. Gillette denied she stopped the services. (Transcript of Record, page 124.)

That the truth lies with Gillis and Newton is reflected from the following: That the services being rendered to the defendants by Gillis, ended December 16 (1946), stands uncontradicted on the record, and

that such was known by Mrs. Gillette, was never directly denied by her.

The only evidence in the record which indicates by inference that Mrs. Gillette did not know of work stoppage is her own testimony on direct examination. (Transcript of Record, page 124.) This testimony is to the effect that sometime in January following stoppage of work, she saw Gillis in the North Pole Bakery and asked him when he would be back on the job. But on cross-examination in reference to the same conversation she testified as follows (Transcript of Record, page 155): “\* \* \* That was why I spoke to Mr. Gillis and I said I wanted to have a birthday party there, and that I wanted to get into the house for *Christmas* and *New Years*, and then that I wanted to have this birthday party particularly. \* \* \*”

Further proof that the foregoing conversation took place in all probability prior to work stoppage December 16 are the facts that Mr. Gillette, according to his testimony (Transcript of Record, page 188) knew that the building had sagged “In December sometime,” and according to the testimony of Newton (Transcript of Record, page 117) the Gillettes during the month of January would have had in their possession a statement of materials furnished and work performed on an hourly basis by Gillis (plaintiff’s Exhibit E). *It will be observed that during the alleged conversation no mention was made of these matters.*

It appears from testimonies of Mrs. Gillette (Transcript of Record, page 125) and Mr. Gillette (Tran-

script of Record, page 177) that prior to stoppage of work they were mad at Gillis because, among other things, *his men had been working for Grant Jackson.*

It is evident, therefore, that the foregoing conversation took place not in January but before Christmas and in all probability prior to work stoppage December 16. *That the conversation did take place prior to work stoppage was the testimony of Gillis.* (Transcript of Record, page 200.)

The testimony of Mr. Gillette in reference to a call made upon Gillis in January following work stoppage is enlightening on the question immediately in point and also that he did not consider a contract broken. Following are quotations from his direct and cross testimonies:

Direct (Transcript of Record, page 167):

“Q. Now, Ben, when did you learn that Mr. Gillis was not going to do any more work on your house? When did you learn that?

A. I never learned it myself at all—I never heard it.

Q. And did you go to see him in January, Ben?

A. Yes, I did; *I waited fifteen minutes out on the street.*

Q. What time in January was that?

A. It was the latter part.

Q. This year?

A. No, last year—that is, last winter.

Q. Why did you go to see him?

A. Well, Duke was to do the plumbing down there and he said the doors would not open and



the building sagged, *and I went up to see him about that.*

Q. That was some time the latter part of January?

A. That is right.

Q. Then when did you see Mr. Gillis, Ben?

A. *After I waited fifteen minutes outside of his shop.*

Q. Was anyone else there when you saw him, Ben?

A. He came out alone.

Q. What did he say?

A. He said, 'Why hello, Ben'.

Q. What conversation did you have with him at that time?

A. Well, I told him we could not get into the house; he told me to nail a couple of 2x4's up and put under——

Q. Did he tell you at that time that Mrs. Gillette had ordered him to quit the work?

A. No, he did not.

Q. When did you hear that?

A. Not any time.

Q. Did Mrs. Gillette tell you that?

A. No, she never told me that.

Q. Now, Ben, state the full conversation you had with Mr. Gillis the latter part of January.

A. *I waited out there fifteen minutes for him to come out——*

Court. Get to the conversation——

A. *Well, the conversation was about the raising of the building over the floor and he spoke about moving the tools away and told me to nail a couple of 2x4's together and put under there, and I told him I would have to get Satterlee to*

*do something there then, and that was the last word we had."*

Cross (Transcript of Record, page 186):

"Mr. Tanner. \* \* \* Now, Ben, you stated that you were up sometime the latter part of January to see the plaintiff?

A. I did.

Q. And you saw him in front of his shop?

A. *Yes, I waited until he came out.*

Q. And your purpose was to see if he could do some work?

A. Yes.

Q. Now he told you why he wasn't coming back?

A. He told me he took his tools away; he did not tell me why.

Q. *Didn't you ask him why?*

A. *No, I didn't."*

If Gillette did not know that work had been stopped by his wife, *why did he hesitate to approach Gillis—why standing out in the cold for fifteen minutes until Gillis left his shop and went out to him? Why did he not inquire as to the reason Gillis took his tools away? Why was his call only about raising the house or the doors would open? Why did he not mention a contract and the statement (plaintiff's exhibit E)?*

In reference to the foregoing conversation Gillis testified as follows (Transcript of Record, page 202):

"Mr. Tanner. Tell us what that conversation was, Mr. Gillis.

A. Mr. Gillette came over and I spoke to him and he wanted to know when we were going to



be back down to his job. And I said we were not going to be there.

Q. Why?

A. *Because Mrs. Gillette had told us to forget the whole thing. He said, 'Did she say that?' He went on talking about who would do the work and I think, if I recall rightly, he might get Pete Satterlee.'*

In reference to plaintiff's exhibit E, Gillis testified as follows (Transcript of Record, page 113):

"Mr. Gillis, you testified on direct examination that defendants have been billed in reference to this account?

A. Yes, that is right.

Q. *Have they ever contacted you in reference to the account?*

A. *No sir.'*

It will be noted that the foregoing call upon Gillis was made by Mr. Gillette, not Mrs. Gillette; yet the evidence shows that Mrs. Gillette had, in the main, been spokesman for the Gillettes in reference to the services performed by Gillis. The evidence also shows that Mr. Gillette had a leg injury. Mrs. Gillette was the logical one to have called upon Gillis. *Why didn't she?* The answer is obvious. *Mrs. Gillette had stopped the work.*

The testimony given at the trial of this cause shows that the Gillettes were informed by Gillis in advance that any work he did for them would have to be wedged in between other jobs he was bound to do, that he put himself out to accommodate them, and

that the main portion of their work was done before work stoppage. *A motive for Gillis to voluntarily stop the work is remote; a motive for Gillettes to deny that they stopped the work is very evident.*

It is submitted that, after Gillis had in good faith undertaken to accommodate Gillettes, they, apparently overlooking the fact that their work was to be secondary to other work, became angry because their work was not being pushed as fast as they desired; and in this state of mind Mrs. Gillette did order the work stopped as so testified by Gillis and Newton.

According to Mrs. Gillette, she went to see Mr. Gillis because he had a good reputation (Transcript of Record, page 125 and page 150). We believe this appraisal correct.

---

**E. BAD FAITH IS NOT RIGHTFULLY ATTRIBUTED  
TO PLAINTIFF.**

1) Plaintiff's work was good.

An examination of the testimony taken at the trial of this cause will show that throughout the trial defendants' counsel and the defendants made special effort to belittle the work done by the plaintiff and by inference made it appear that his work was inferior workmanship. The testimony does not sustain his point of view:

Oscar A. Margraf, defendants' witness, testified that the work he observed had been done in a "mechanical way" (Transcript of Record, page 197); Hugh F.

Paterson, plaintiff's witness, testified that the cement work was a standard pouring job (Transcript of Record, page 216); Mrs. Gillette testified that certain work that was done was good and that her main objection was that the work had not been finished (Transcript of Record, page 156).

*The defendants failed to produce any affirmative testimony to sustain their inferences that plaintiff's work in any particular was not done in a standard mechanical manner.*

**(2) Plaintiff did not leave house unbraced.**

The trial Court's finding that plaintiff left defendants' house unbraced is entirely unjustified by the evidence. After stoppage of work and before the defendants attempted to complete the work on their house, it may have sagged; but such sagging was not due to lack of bracing. It was due to the fact that until the cement was poured for the basement floor, the braces were of necessity *temporary braces which had to be grounded on frozen ground. The heat from the house furnace naturally thawed the foundation and, thus, the supports lowered* (Mr. Gillette's Testimony, Transcript of Record, page 188; Mrs. Gillette's Testimony, Transcript of Record, page 154; Mr. Gillis' Testimony, Transcript of Record, page 204).

**(3) Plaintiff did not "wantonly and negligently" fill in sump.**

The trial Court's conclusions that plaintiff "wantonly and negligently" filled in defendants' sump i

wholly unjustified by the evidence. The testimonies of Gillis and Mrs. Gillette show that it was the understanding of the parties that the Gillettes were to prepare their basement for the cement work: That when Gillis was ready to pour the cement the basement had not been prepared; *and as a favor to Gillettes Gillis hired Ben Young to haul in the back-fill* (Gillis' Testimony, Transcript of Record, page 66; Mrs. Gillette's Testimony, Transcript of Record, page 157).

4) Plaintiff did not "wantonly" cut off corner of defendants' house.

The trial Court's inference, as contained in his conclusions, that the cutting off of a corner of defendants' house was wantonly done and that plaintiff wilfully failed to repair same is not justified by the evidence. The reason for cutting off the corner and the reason it was not completely repaired were given by Gillis under cross-examination (Transcript of Record, page 91).

Mrs. Gillette testified on direct examination that the corner was cut off without her knowledge (Transcript of Record, page 146), *but under cross-examination reversed herself* (Transcript of Record, page 60).

---

**F. PLAINTIFF PERFORMED WORK FOR DEFENDANTS OF THE REASONABLE VALUE OF \$2,220.75.**

The work and hours of work performed by the plaintiff for the defendants and the rate charged were testified to by Gillis (Transcript of Record, page 63). Plaintiff's exhibit A are the daily time sheets.

*The record fails to disclose any affirmative testimony to disprove the foregoing testimony of Gillis, and we believe it must stand as true and represents the reasonable value of his work.*

The reasonable value of the work performed is strengthened by the testimony of defendants' witness, Margraf, who testified that he was not a carpenter—he was a miner—and that his charge for the work he did for the defendants was at the rate of \$2.00 per hour (Transcript of Record, page 196).

---

**G. DEFENDANTS' DAMAGES, IF ANY, ARE SMALL,  
THEIR BENEFITS LARGE.**

By reference to the trial Court's findings and conclusions (Transcript of Record, page 46), it will be observed that in the main the *damages allowed the defendants are the costs of completing their work. These costs are certainly not elements of damages if the theory of plaintiff's appeal be sustained.*

The evidence taken at the trial of this cause (Transcript of Record, page 59) shows that the plaintiff not only furnished to the defendants the materials and services for which the trial Court allowed him the sum of \$526.08; but, in addition, he performed labor for the defendants of the reasonable value of \$2,220.75. *The plaintiff thus bestowed benefits upon the defendants of the total reasonable value of \$2,746.87; and of this sum he has received only \$1,000.00* To date, therefore, *the defendants are enriched at the*



expense of the plaintiff in the reasonable sum of \$1,-46.83. Defendant's work was substantially performed.

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#### H. PLAINTIFF'S LIEN WAS FILED AND ACTION BROUGHT WITHIN THE TIME PROVIDED BY LAW.

Alaska Law, A. C. L. A., 1949, Sec. 26-1-1, defines those entitled to file a lien; Sec. 26-1-5 provides a 90-day period for filing lien; and Sec. 26-1-7 provides a six months' period for bringing action.

The evidence in this cause shows plaintiff's services to the defendants ended December 16, 1946; plaintiff's Exhibit B shows filing lien March 14, 1947; and clerk's endorsement on plaintiff's complaint (Transcript of record, page 6) shows action commenced September 3, 1947.

It is the contention of appellant that his services to the defendants including the furnishing of labor and materials ended December 16, 1946: *That in order to accomplish for the defendants the things they desired the labor and materials were essential, each being dependent upon the other in accomplishing the results desired by the defendants: That the labor and materials furnished were not the result of separate agreements but comprised one account against the defendants for services rendered.*

We have been unable to find anything in the record to sustain the trial Court's assumption "That all of said services and supplies were furnished between the

12th day of November, 1946, and the 15th day of December, 1946 (Transcript of Record, page 45; Findings, Sec. IV).

- (1) Liens for labor and materials are liberally construed.

*Arctic Lumber Co. v. Borden*, 211 Fed. 50;  
*Hooven, Owens & Rentschler Co. v. John Feathersone Sons*, 111 Fed. 81;  
*Russell v. Hayner*, 130 Fed. 90.

- (2) The right to a foreclosure of lien.

(See Appellant's Opening Brief, First Appeal page 10.)

- (3) Right to interest.

(See Appellant's Opening Brief, First Appeal page 9.)

- (4) Right to attorney's fees and costs.

(See Appellant's Opening Brief, First Appeal page 8, and Reply Brief, page 4.)

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## V. CONCLUSION.

We believe that the trial Court's judgment, besides being contrary to the law applicable to his findings is inconsistent with the evidence taken at the trial of the cause. The evidence, we believe, justifies only the following conclusions: The appellant is entitled to judgment not only for the materials furnished by him to the appellees and for which the trial Court ha



allowed him credit but also for the reasonable value of the labor performed, for the foreclosure of his lien on the total sum found due him, and for interest, costs, and reasonable attorney's fees.

Dated, Nome, Alaska,  
May 3, 1950.

Respectfully submitted,  
C. C. TANNER,  
*Attorney for Appellant.*



No. 12,145

IN THE

**United States Court of Appeals**  
**For the Ninth Circuit**

---

W. M. (alias Bill) GILLIS,  
*(Plaintiff) Appellant,*

VS.

BEN F. GILLETTE and  
IRENE GILLETTE,  
*(Defendants) Appellees.*

**BRIEF FOR APPELLEES.**

**(Plaintiff's Second Appeal.)**

---

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FILED

JUN 15 1950

PAUL P. O'BRIEN,

CLERK



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---

**INTRODUCTION.**

It is apparent to us, at the outset, that the appellant has failed to comply with Rule 20(d) of this Court. Unless one could treat the paragraph entitled "Summary of Questions Involved" as a sufficient compliance with said rule, there is no specification of the errors appellant relies upon anywhere in the brief. In the said summary the Court is referred to a transcript page number for information as to appellant's specifications of error. This does not satisfy the rule.

*Peck v. Shell Oil Co.* (CCA 9), 142 F. (2d) 141, 143;

*Thiel v. Southern Pacific Co.* (CCA 9), 169 F. (2d) 30.

Nowhere prior to the section in the brief entitled "Argument" is there any particularity. It also fails to supply the specification. That part of his brief entitled "Summary" (Br. p. 5), asserts that the questions raised by this appeal may be summarized by stating the six questions there set forth. All but one of them unquestionably show that appellant intends to raise by the questions listed questions respectively on the sufficiency of the evidence to support (not a conclusion of law as there stated, but) a Finding of Fact. The first question is the one exception we mentioned. It, as shown in appellant's Argument of it, Sub. (2), Br. p. 7, attempts also to raise a question on the sufficiency of the evidence.

---

## ARGUMENT.

### I. THE AGREEMENT.

Despite appellant's failure in his brief to properly raise such question, we intend nevertheless to now reply to his argument in reference to the sufficiency of the evidence by quoting some of the testimony in the record. He claims under his second question on page 9 of his brief that no agreement was arrived at on or about August 8, 1946 as stated in Paragraph III of the Findings of Fact. (T. p. 44.) His argument on this point indicates that in order that there be an agreement, that the whole agreement be in writing. This, apparently, is his contention. Otherwise it is unexplainable. A cursory examination of the testimony, relative to the agreement, indicates quite positively that the evidence supports the findings.

In endeavoring to decide how much of the testimony to quote, we shall be ever mindful of the rule that where the Court has considered conflicting evidence and made its findings thereon, the trial Court is presumptively correct—the trial Court, being the exclusive judge of the weight of the evidence and the credibility of the witnesses.

*Columbian Nat'l Ins. Co. v. Quandt* (CCA 9), 154 F. (2d) 1006;

*Lassiter v. Atkinson Co.* (CCA 9), 176 F. (2d) 984, 993;

*Grace Bros., Inc. v. Comm. Int. Rev.* (CCA 9), 173 F. (2d) 425;

*Rothman v. Wilson* (CCA 9), 121 F. (2d) 1000;

*Wingate v. Bercut* (CCA 9), 146 F. (2d) 725.

In determining whether there was sufficient basis in the evidence for the trial Court's Findings of Fact, this Court is, we submit, required to take that view of the evidence which is most favorable to the appellees.

*Smith v. Porter*, 143 F. (2d) 292.

The testimony selected by us in the light of the said decisions follows:

(For purposes of convenience we shall henceforth in quoting testimony refer to appellee Ben F. Gillette as Ben, and to appellee Irene Gillette as Irene.)

Ben testified (T. p. 164):

“A. I saw the agreement—I took it for an agreement, a contract.

Q. When was that, Ben?

A. Well, when she—my wife got it up at the Nome Motors office and brought it down.

Q. About what time was that?

A. Well, I would say it was around the *8th of August*. That was when the agreement was made. It was later than that that we got it, I think.

Q. Ben, I will show you defendant's Exhibit No. 1 and ask you if you recognize it?

A. Yes, that is the one I saw and I took it for a contract.

Q. When did you first see this, Ben?

A. Well, I think it was sometime after the 8th of August; I could not say exactly the time. \* \* \*

Q. I show you now defendant's Exhibit No. 2, a plat of the building; do you recognize that?

A. I do; that is her own drawing.

Q. Was that with this agreement?

A. Yes, it was.

Q. Did you see Mr. Gillis with relation to this agreement?

A. I did." (*Italics ours.*)

Irene testified on direct (T. p. 126):

"Q. I hand you Exhibit No. 1 and ask if that is all Mr. Gillis gave you?

A. That is absolutely all.

Q. Does that embody the things he was to do?

A. That is the way we understood it.

Q. And the price?

A. That is the price.

Q. I hand you defendant's Exhibit for identification, Exhibit No. 2, and ask you to examine it and state whether or not that is the plat that you refer to as having given to Mr. Gillis when you first saw him?

A. That is right, it is.

Q. And on the subsequent day, did—when he gave you Exhibit One, did he return to you this plat?

A. That is right, he did.

Q. Had that been changed in any way?

A. Not a bit.

Mr. Cochran. Now, I intended to have a larger plat of this made, Your Honor. However—now, Mrs. Gillette, will you just show the Court what additions on this plat—what was to be put on the building?

The Court. I think I understand it.

Mr. Tanner. Frankly, we would like to see that too.

*(Defendant pointed out to Court the work that was to have been done.)*

Mr. Cochran. Did he build the addition on the west end?

A. No.

Q. And that extended the full width of the house?

A. That is right.

Q. Is that what is referred to in the memorandum that he gave you, 'to complete the addition as shown'?

A. I would say so.

Q. And that was not completed at all?

A. No, sir.

Q. And nothing was done on it?

A. No.

Q. Why?

A. Because I told him we were not ready to do it yet. He came down to ask us if we were going to let him do our work and I said yes, but we were not going to put on the 8x30 part; we



just wanted the 7x17 porch made into a dining room. We did not say anything about reducing the price at that time."

[Evidence of additional or separate agreement.]

"Q. Did the price of \$2872.28—did that include building this 30 foot addition?

A. Sure.

Q. And you told him he need not build that?

A. That's right." (*Italics ours.*)

And Irene said, p. 137:

"Q. Just what did you discuss with him, Mrs. Gillette, as to what was to be done?

A. Well, I did not discuss it a great deal. It was marked quite plainly and we told him that was what we wanted done.

Q. I believe you testified that Mr. Gillis came subsequently and asked about the work, did you, Mrs. Gillette?

A. He came two or three days later and said, 'Did you folks decide to let me do your work?'

Q. Was Ben there?

A. Yes, he was there.

Q. Had you shown it to him?

A. Yes, I had, and talked it over.

Q. He did not come inside?

A. Just poked his head in the front door.

Q. What did you and Ben say about his going ahead?

A. We said yes, but we were not going to have the 30x8 built on. The plat showed what we were not going to have done. We did not discuss the price and thought we would never have any trouble with the contract.

Q. What did Mr. Gillis say with reference to the addition to be put on, the 8x30?

A. He did say, when he handed me this plan back and the contract, he said he might not be able to do the inside finishing on the 8x30 until spring. That was the main reason why we did not have it done, because we thought we would be torn up probably through the cold weather or something."

Irene, on cross-examination, T. p. 151:

"Q Well, Mrs. Gillette, there are a lot of ways to build an addition.

A. Well, we agreed to furnish the material.

Q. Then, there was nothing discussed with Mr. Gillis relative to the kind of materials that would go into the building?

A. No, there was not.

Q. In other words, that was left to your instructions?

A. On the contract it says so."

Ben testified further on redirect, T. p. 176:

"Mr. Cochran. \* \* \* Now Ben, this building was moved onto the concrete foundation above the basement—onto the basement foundation about what time? About what time was it that the plaintiff in this case, Mr. Gillis, got this building moved onto the basement?

A. I wasn't down there to know, but I would say sometime *in November.*" (*Italics ours.*)

Ben said, T. p. 177:

"Q. Now, Ben, what was the condition of the building when he put it on there, with reference to being open and exposed to the weather?

A. Well, the windows in the basement were all open and the new addition was all open, and



the building was left alongside of the cement there for several days. They took all the men and went to work for Grant Jackson, and let the basement freeze up.

Q. Did the basement freeze up, you say?

A. I did, yes.

Q. Why?

A. Well, the reason was because the building was not on in time."

And Ben, p. 165:

"Q. Now, Mr. Gillette, after you told him to go ahead on the work, when did he start on it?

A. When did he start? Well, I think it around the *16th of September*—

Q. What did he do then, Ben?

A. He started to tear out the forms out there, and he poured cement—" (Italics ours.)

Irene said on direct examination, T. p. 130:

"Q. It is admitted that you paid to Mr. Gillis on this agreement the sum of \$1000.00, isn't it?

A. That is right.

Q. When was that paid?

A. On *October 10th.*" (Italics ours.)

Defendant's Exhibit No. 1, written memo, and defendant's Exhibit No. 2, drawing, do not conflict with any of the foregoing testimony.

---

## II. SEPARATE AGREEMENT—LABOR AND MATERIALS.

Appellant contends (Br. p. 33) that labor and materials were not furnished by virtue of a separate agreement within the meaning of Finding of Fact,

Paragraph IV. (T. p. 45.) In support of the finding, we here refer to and adopt the foregoing testimony and quote the following:

Irene testified on direct (T. p. 128):

“Q. It was specified that no interior work on the whole house was to be done?

A. That is right.

Q. And no plumbing?

A. That is right.

Q. And no wiring?

A. That is right, no wiring.

Q. And all material furnished by you?

A. Yes. He came to us *several times* to ask if it was all right for *him* to buy it, and we said it was OK.” (Italics ours.)

Ben testified on cross-examination (T. p. 186):

“Q. Now, Ben, on this construction—on the details as to what you wanted done, you instructed the plaintiff from day to day as to what you wanted done, didn’t you?

A. I did not.

Q. Well, you said you tell him how the windows were to be put in?

A. Yes. Outside of that, I did not have anything more to do with it.”

Ben said on direct examination (T. p. 165):

“A. When he was going to move the building. He came down and measured and I went down and told him how the windows were to go in and all that.”

It is inferable from the foregoing testimony that after the August 8th agreement had been entered into,

and it had been decided to make the 7x17 porch into a dining room, a separate agreement (or agreements) were orally made which agreement required ("He came to us several times to ask if it was all right for him to buy it and we said OK.") that appellant should furnish some of the material for which appellees were to pay extra and that he was to install the windows.

---

### III. THE ABANDONMENT OF THE CONTRACT WAS WITHOUT CAUSE AND WILLFUL.

(a) No order to stop work was given by Mrs. Gillette.

Appellant in his brief, page 33, argues that the Court should have found according to appellant's view of the conflicting evidence on the question of the abandonment of the contract. To avoid repetition in the quoting of the testimony, we intend to reply to his argument under this heading by here incorporating by reference our reply (*infra*) to his argument in his brief, page 39, under the heading, "Bad faith is not rightfully attributed to plaintiff." besides quoting the following testimony. In reviewing the following testimony we shall be ever cognizant of the rule enunciated by this Court in respect to the conclusiveness of a trial Court's finding on the question of "good faith".

*Lassiter v. Guy F. Atkinson Co.* (CCA 9), 176  
F. (2d) 984, 993.

Ben testified on direct examination (T. p. 170):

"Q. When did they start to move the building?"

A. On the 15th of October.

Q. Where?

A. Out into the street.

Q. How long did it remain in the street?

A. Oh, I cannot tell you that.

Q. Well, about how long?

A. Well, it was a long time; I would not say about how long."

Irene testified, on direct examination (T. p. 131):

"Q. Now, when did the plaintiff, Mr. Gillis move your house onto its present location?

A. Do you mean when he started or when he finished?

Q. When he moved it.

A. Approximately November 12th, because that was when the furnace was put in and that was done as soon as the building was on the foundation and it could be done."

Irene said (T. p. 129):

"Q. Now, when did they start to move this building from the south side of Front Street to the otherside of the street?

A. On the 14th day of October, he came in and took the stairs out that had been temporarily put in, and on the 15th, about 8 o'clock in the morning, they came and told us we would have to get out. On the morning of the 15th we were eating breakfast and they dashed in and told us we would have to get out and that they were going to move the house. And so we went to the hotel."

Irene testified, on cross-examination (T. p. 155):

"Q. Now, calling your attention, Mrs. Gillette, to your statement that you could not go into the

house until February 15th, am I correct in stating that you testified on direct examination that you had a party in your house on January 20?

A. No. That was why I spoke to Mr. Gillis and I said I wanted to have a birthday party there, and that I wanted to get into the house for Christmas and New Years, and then that I wanted to have this birthday party particularly. I did not say I had one; I said I wanted to have one."

Irene (T. p. 156):

"Q. So that your main objection is that the work was not finished?

A. That is right."

Irene, further on direct (T. p. 130):

"Q. It is admitted that you paid to Mr. Gillis on this agreement the sum of \$1000.00, isn't it?

A. That is right.

Q. When was that paid?

A. On October 10th."

Ben said, on direct (T. p. 166):

"Mr. Cochran. Mr. Gillette, when were you able to move into this house? After it was on its foundation?

A. Why, we left the hotel on the 15th of February.

Q. When did you move out of your house?

A. We left on the 15th of October.

Q. And were you able to live in your house between the 15th of October and the 15th of February?

A. No."

Ben said further (T. p. 168):

“Q. Now, Ben, state the full conversation you had with Mr. Gillis the latter part of January.

A. I waited out there fifteen minutes for him to come out——

The Court. Get to the conversation——

A. Well, the conversation was about the raising of the building over the floor and he spoke about moving the tools away and told me to nail a couple of 2x4's together and put under there, and I told him I would have to get Satterlee to do something there then, and that was the last word we had.”

Irene also testified, on direct (T. p. 124):

“Q. Well, in the presence of this boy, on the 16th day of December, 1946, or at any other time, did you tell Mr. Gillis in substance to stop work on the moving of your building across the street?

A. Indeed I never did; I never told him to stop work.

Q. Did you after that time talk to Mr. Gillis or speak to him about completing the job?

A. Yes, sir, I talked to him in the North Pole Bakery. I would say it was approximately two weeks before the 20th of January, because I was going to have a party for a friend's birthday. Mr. Gillis was having coffee at the counter and I walked over and said, ‘When will you get us into our house?’ He said, ‘I am going to get to it right away.’ He said as long as the basement is frozen, we cannot finish. I said, ‘You will never thaw the basement in a million years.’ Then he said, ‘I never wanted to do that job anyway,’ and I said, ‘We are very well aware of that, and we



don't appreciate letting the work go and going to work for Mr. Jackson after storm.'

Q. Was that after the 16th day of January?

A. Yes, somewhere before the 20th, but after the first of the year, because I had that party in mind."

She testified (T. p. 125):

"Q. When did you negotiate with Mr. Gillis with reference to moving this building?

A. On approximately the 8th of August. I presume it might have been a couple of days before."

Ben, on cross-examination, testified (T. p. 188):

"Q. Now, you were anticipating having the cement basement?

A. Yes.

Q. And no doubt, cement pillars?

A. No.

Q. In other words, to be permanently braced, the basement would have to be poled, isn't that correct?

A. Yes, I asked him to put those posts in at the time it was moved, but those posts were never there and never did show up."

Ben, further on the same page:

"Q. And so the temporary pillars placed under the building, with heat in your furnace, would probably cause it to sag a little bit, due to the thawing, and so on?

A. It never was put in."

Ben's testimony, on direct upon this subject (T. p. 177):



“Q. Was the furnace connected up in the basement after the house was moved?

A. It was.

Q. When?

A. I think—it is hard for me to say, I was not down there.

Q. About what time was it, don't you know?

A. Well, sometime in November.

Q. Sometime in November?

A. Yes.

Q. Was fire kept in it?

A. Yes, all the time.

Q. Who kept the fire?

A. The people that worked in there had a fire there.

Q. Who was using the building?

A. Well, Mr. Gillis' men.

Q. And why did they keep a fire in it?

A. Well, so they could work.”

Irene, on direct (T. p. 134):

“Q. Was it necessary then to have posts put under there?

A. It was, yes.

Q. Was Mr. Gillis requested to do that?

A. Well, Mr. Gillette went up to see him and tell him the floor had sagged.”

She said also, same page:

“A. We employed Mr. Satterlee to put five posts under the house.

Q. And what did you have to pay for that?

A. That was \$190.00. He did some other things along with that, like chinking up the outside, because there was no skirting on between the house and the foundation. He also put the window in

the basement; there had been a gunny sack over that."

Irene, on cross-examination, testified (T. p. 154):

"Q. Now, when did you first learn that the building had sagged on its new foundation?

A. Mr. Metrovich came to me and said, 'You better do something about your house; I don't think Mr. Gillis is going to finish it and it's beginning to sag.'

Q. When was that?

A. Well, I will tie it in with something; he said, 'You better do something about it'; I cannot tell you exactly the date.

Q. Well, I want to know about the time——

A. Well, it was a couple of days, because I came home and——

The Court. Can you place that date? That is the question.

A. Well, it is a matter of trying to remember. We estimate that he went up there the latter part of January, or somewhere in there.

Q. And it would be just a short time before that?

A. No, he went right away when we knew he wasn't going to finish it or had not even mentioned it."

Ben, on direct (T. p. 174):

"Q. Were there posts put into the building before it was moved?

A. I did——

Mr. Tanner. Pardon me—the witness has not testified to that; it is just leading again——

Mr. Cochran. Were there any posts in the building before it was moved?

A. There were.

Q. How many?

A. Well, about 8 feet apart, running right through and 24 in length.

Q. Now, who put those posts in for you, Ben?

A. When the contractor built the house——

Q. No Ben, I mean after it was sagged on its present location?

A. Oh, Pete Satterlee."

Ben, also on direct examination (T. p. 170):

"Q. Now, did the plaintiff in this case complete the basement?

A. He did not.

Q. What did he fail to complete?

A. He did not put in the basement floor——

Q. Did you discuss with him the basement floor?

A. I did, and told him where I wanted the hole for the septic tank.

Q. Was there a septic tank, you say, Ben? What did you tell him about that?

A. Yes, the septic tank was to go straight down from the floor above and there were two places to be left open when the cement was put in.

Q. Was that filled up—did you have an excavation made for a septic tank?

A. No, we did not, but I meant for him to leave a hole in the cement.

Q. He did not put in the cement, did he?

A. No.

Q. Well, who put in the floor?

A. I did.

Q. What was the condition of the floor as to being frozen or thawed?

A. Well, I thawed on it four months with wood, coal and the furnace, and I had a pump there that I circulated the water through; and I picked frost and got it in shape before starting to put the floor in.

Q. Was it necessary to thaw it?

A. It had to be thawed.

Q. How did it happen to freeze?

A. By not putting in the floor when it should be."

Irene, on cross-examination (T. p. 161):

"Q. Yes, you told us that; but what I want to know is that the records show in this case that the work ceased on the 16th day of the month?

The Court. What month was that?

Mr. Tanner. The 16th day of December, Your Honor.

A. Well, we talked to Mr. Gillis in the North Pole at least a couple of times after that, and he said he would be down any day.

Q. When did you talk to him?

A. I know it was after Christmas. It was after he got married, and that was about the first of the year.

Q. When you say 'we,' whom do you mean?

A. My husband and I. We had to eat at the North Pole.

Q. Now, you told us under direct examination that at one time you claimed you saw Mr. Gillis in January.

A. Yes. He was sitting at the counter at the North Pole, and we did very meekly ask him when he would get at our house. We just sat at the table and asked him how he was getting along with it.

Q. Well, you say you were very meek about it——

A. Well, the only time I got mad was when he said, 'Well, I didn't want to do it anyway,' and I said, 'I am well aware of it'; I never got mad before."

Ben, on cross-examination (T. pp. 186-7):

"Mr. Tanner. I won't press that, Your Honor. Now, Ben, you stated that you were up sometime the latter part of January to see the plaintiff.

A. I did.

Q. And you saw him in front of his shop?

A. Yes, I waited until he came out.

Q. And your purpose was to see if he could do some work?

A. Yes.

Q. Now, he told you why he wasn't coming back?

A. He told me he took his tools away; he did not tell me why."

Thusly it appears that the chronological order of events, even without reference to other surrounding circumstances, would be sufficient to sustain a finding of *willful* abandonment, to-wit:

Aug. 8th—Agreement made to move building before Oct. 20th.

Aug. 11th—Agreement reaffirmed with modification.

Sept. 16th—Foundation forms on new site were fixed and cement poured.

Oct. 10th—\$1,000.00 was paid on contract.

Oct. 14th—Stairs to the building were removed.

Oct. 15th—Building commenced to move on rollers out into the street after the occupants had on said day vacated it.

Nov. 12th—A few days after new basement had frozen, the building arrived onto the foundation at its new location; furnace was thereupon connected up and fire thereafter maintained in it by appellant's workmen.

Dec. 16th—Appellant ceased all work.

Jan. 16 (approximately)—Appellants were informed that building had "sagged".

Jan. 16th (approximately)—Appellant told Ben that appellant had removed his tools and equipment from the job.

Feb. 15th—Appellees moved back into building only after a third party (workman) had made it possible for them to so do.

(b) The sump was "wantonly and negligently" filled in.

In addition to the foregoing and the following evidence being indicative of "bad faith" on the part of appellant, it supports Paragraph VII of the Findings of Fact (T. p. 22) to the effect that appellant had wantonly and negligently filled in the sump.

Irene testified, on direct (T. p. 135):

"Q. Did you do anything toward drainage or sumps?

A. Yes, we had Mr. Hoop put a barrel in there.

Q. And what happened to that sump?

A. It was filled in.

Q. Who filled it in?



A. Whoever put the backfill in that Mr. Gillis had down there.

Q. State whether or not it was usable after it had been filled in, Mrs. Gillette.

A. No, we had to dig a new one."

And on cross-examination (T. p. 156):

"Q. Now, speaking of the sump, Mrs. Gillette, tell us a little more about that—just what purpose the sump was fulfilling and what was done.

A. Well, it was filled in so we could not use it. That was to be used for the overflow for the septic tank."

And on page 157:

"Q. Did you, or anyone that you know of, point out this sump to Mr. Gillis?

A. I did myself. I said, 'Don't fill up our sump.'

Q. To Mr. Gillis?

A. Yes."

Irene said further, on direct (T. pp. 142-143):

"Q. \* \* \* Now, was there a sump prepared in this basement?" (Deletion ours.)

"A. Yes, there was.

Q. Explain what that was.

A. We had Mr. Hoop come with his equipment and thaw several holes there and then they put down this barrel, a big tank, to use, and the drain was under where he thawed out.

Q. What happened to that?

A. That was filled in.

Q. By whom?

A. By Mr. Gillis.

Q. What did you have to do subsequently?

A. We had to dig a new sump."



Irene, on cross-examination, said (T. p. 160):

“Q. Well, all right. Now, relative to this sump that you talked about, Mrs. Gillette, you mentioned that the cost—as a matter of fact, how was it fixed?

A. There was a big tank put in there. I know it was, and there was a tank outside connected with this sump, and there was a big oil tank put in——

Q. It was to be used as a cesspool?

A. It was to be an overflow.”

Irene, under cross-examination, testified (T. p. 157):

“Q. Did you, or anyone that you know of, point out this sump to Mr. Gillis?

A. I did myself. I said, ‘Don’t fill up our sump.’

Q. To Mr. Gillis?

A. Yes.”

**(c) One corner was wantonly cut off.**

The following testimony not only tends to also show bad faith on the part of appellant, but it supports the Court’s finding contained in Paragraph IX of the Findings of Fact (T. p. 47) to the effect that plaintiff wantonly cut off one corner of the house in the moving of the same and failed, neglected and refused to repair the said damage, to-wit:

Ben, on his direct, said (T. pp. 181-182):

“Q. You say you don’t know who cut that corner off?

A. No.

Q. Did you?

A. No.

Q. Did you have it done?

A. No, I did not."

Irene said, on direct (T. p. 146):

"Q. Now, the corner that was cut off of the cornice of this building—has that ever been repaired?

A. No, it has not.

Q. As to the cutting of that off—did you authorize Mr. Gillis to cut that off?

A. I did not.

Q. Did you know anything about it?

A. No, he came into the office——

Q. Did Mr. Gillis have any conversation with you with reference to that?

A. Well, he came to the office——

Q. What do you mean by 'the office'?

A. The Nome Motor Company office, and he said, 'We have got to cut the corner off the cornice,' and I said, 'Why don't you have the telegraph poles removed?'; but when I came back, the corner was cut off.

Q. Did he have the telegraph poles removed?

A. He did.

Q. What do you estimate the cost of repairing the cornice that he took off?

A. I would say \$100.00."

Irene, on cross-examination, said (T. p. 160):

"Q. Now, Mrs. Gillette, you first stated, I believe, didn't you, that you did not know anything about the cutting off of the cornice?

A. Not until it was done.

Q. Well, then didn't you state afterwards that Mr. Gillis came down to the office of the Nome

Motor Company and told you that he was going to cut it off?

A. Well, he had already cut it off—he must have, because I went down there that night and it was done——

Q. When did he see you?

A. Well, after 5 o'clock, I went down to see what had happened. I don't know when he did it, but before he moved the poles it was done."

We respectfully submit that the testimony we have quoted hereinabove furnishes positive proof that there was sufficient basis in the evidence for the trial Court's finding not only that the abandonment was without cause and willful, but that appellant was guilty of "bad faith" in his non-performance of his agreement with appellees. We shall now devote our attention to the remaining question of the six listed in his summary, the argument on which is set forth in his brief, page 5, under the heading, "Analysis of Court's Findings, Conclusions and Judgment."

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#### IV. THE EVIDENCE SUPPORTS THE AMOUNT OF DAMAGES FOUND.

##### (a) Basement damage \$327.50.

On page 7 of the brief, appellant under sub-title, "Amount of damages inconsistent with evidence," argues in effect that there was no basis in the evidence for the finding that appellees were damaged in the amount of \$327.50 for appellant's failure to complete the concrete basement, or for the finding that appellees were damaged in the sum of \$190.00 for

appellant's failure to repair the damage he did to the house by permitting it to stand unbraced and thereby causing the floor to sag five inches in the center. We intend to now show that there was a sufficient basis in the evidence to support each of the said findings.

Ben testified, on cross-examination (T. p. 173):

“Q. Can you give me approximately the number of hours you put in in thawing, and the basement floor preparing to put in the cement, and putting it on? Putting the cement on?

A. Oh, about 160 hours.

Q. Do you know what is paid regularly in Nome for that character of work?

A. I don't know.

Mr. Tanner. Just a minute—this man has not established himself.

The Court. The answer was that he doesn't know.

Mr. Cochran. Now, Ben, did you do all the work yourself in pouring this basement floor?

A. I did.

Q. And there were close to nine cubic yards put on the floor?

A. Of cement? Yes.

Q. You mixed it all yourself?

A. I did.”

For some evidence of the reasonable value of such work, the trial Court had before it the testimony of the witness, Margraf. Appellant urges this Court to use Margraf's testimony as a gauge for determining reasonable value. (Br. p. 42.) Margraf testified that his charge for (comparable) work is \$2.00 per hour.

(b) Damages for leaving house unbraced.

Irene testified, on direct (T. p. 134):

“A. We employed Mr. Satterlee to put five posts under the house.

Q. And what did you have to pay for that?

A. That was \$190.00. He did some other things along with that, like chinking up the outside, because there was no skirting on between the house and the foundation. He also put the window in the basement; there had been a gunny sack over that.”

Irene (T. pp. 140-141):

“Q. Have you the receipt for the amount you paid him for that work?

A. I have my cancelled check. I have two cancelled checks; he did two jobs. I have one check for \$175.00 and one for \$17.00; \$15.00 of that was putting in the basement windows; \$175.00 was for the braces and taking off the ice and snow from the roof on the addition.

Q. What was the total amount you paid?

A. \$190.00 we entered.

Q. Are there \$2.00 there we overlooked?

A. The check for \$17.00—\$15.00 in here and probably \$2.00 for something else.

Q. Did this pay for that work?

A. Yes.

Mr. Tanner. What work?

A. Taking ice and snow off of the roof, raising the house the five inches it sagged and putting in the basement window that was left out with a gunny sack over it. I think he also finished the partition there that was started and never finished.

Mr. Tanner. In other words, completing the house?

A. Well, we had some more done after that, Mr. Tanner.

Mr. Tanner. Well, that was putting in braces to keep it from sagging?

A. To keep it from sagging again."

The total number of hours at \$1.75 per hour which go to make up the one of the two checks which was for a total of \$175.00 is shown (T. p. 142) to be (47 hours plus 18 hours plus 35 hours) 100 hours.

The two cancelled checks totalled \$192.00.

The Court found (T. p. 49) that appellees were entitled to but \$190.00.

Instead of the evidence being insufficient to show the amount of the damages which the Court allowed, the evidence shows more damages than the Court actually allowed.

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## V. THE FINDINGS SUPPORT THE CONCLUSIONS OF LAW AND JUDGMENT.

a) Court found appellant was entitled to \$1,000.00 for his labor.

In his argument (Br. p. 6), under the heading, "Conclusions and Judgment Inconsistent with Findings", appellant contends that even if he concedes that the findings be true that "the plaintiff's abandonment of the work was willful and without cause," that nevertheless appellant should not thereby lose any balance due him for labor under the contract.



(Appellant is evidently not yet willing to accept the Opinion of this Court (T. p. 39) in his first appeal.)

The finding, Paragraph III (T. p. 44) that (appellant) "plaintiff continued to work on said dwelling from time to time until Dec. 15th, 1946 \* \* \*" when read in conjunction with another finding in the same paragraph, "that on October 10, 1946, defendants paid to plaintiff the sum of \$1,000.00 to apply on the total cost" as well as the findings as a whole, is conclusive not only upon the question of what constitutes the reasonable value of appellant's labor but of the amount of work plaintiff performed.

Appellant's contention must therefore be based upon the false assumption that the trial Court is compelled to believe the testimony of appellant in matters in which he was not contradicted by other testimony.

Even if there be no conflict in the evidence, the question of whether the testimony of a witness should be believed, is one upon which the finding of the trial Court is conclusive.

*Weber v. Calif. Gold Mines* (CCA 9), 121 F. (2d) 663;

*Lerner Stores v. Lerner* (CCA 9), 162 F. (2d) 160.

(b) Appellees are not precluded by the amount asked in the ad damnum clause in their cross-complaint.

Appellant complains further (Br. p. 7) that, because appellees, in their cross-complaint (T. p. 14), failed to pray for general relief but instead alleged as follows:

“That by reason of the breach of said contract by the plaintiff and his failure to move said dwelling and have the same ready for occupancy as provided for in said agreement, the defendants have been damaged in the sums and amounts as herebefore stated and in the total sum of \$2,597.14.

“Wherefore the defendants pray judgment against the plaintiff for the sum of \$724.86; and for the costs and disbursements herein incurred, including a reasonable attorney’s fee.”,

that the judgment for \$391.17 in favor of appellees (T. p. 52), cannot be permitted to stand.

We see no merit in such contention especially in view of the power of the Court to allow amendments even to the *ad damnum* clause so as to enable it to grant a larger amount of relief than the amount demanded in the pleadings.

15 *Amer. Jur.*, Damages, Sec. 303, p. 745.

Appropriate relief under the facts pleaded, despite the designation of the cause or the prayer for relief, will be granted.

*Johnson v. Jackson* (DC Pa.), 82 F. Supp. 915;  
Affmd., 173 F. (2d) 223.

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## VI. CONCLUSION.

In conclusion we here incorporate and adopt by reference “Brief for Appellees” on appellant’s first appeal herein and we respectfully submit that not only is each of the findings supported by the evi-

dence but that the findings support the conclusions and judgment.

The judgment should therefore be sustained.

Dated, San Francisco, California,

June 5, 1950.

Respectfully submitted,

CHELLIS CARPENTER,

*Attorney for Appellees.*

**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

R. W. POINTER, doing business under the fictitious  
name and style of Pointer-Willamette Co.,

*Appellant,*

vs.

SIX WHEEL CORPORATION, a corporation,

*Appellee.*

---

**APPELLANT'S BRIEF**

---

Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**FILED**



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**In the United States**  
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R. W. POINTER, doing business under the fictitious  
name and style of Pointer-Willamette Co.,

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**APPELLANT'S BRIEF**

---

Upon Appeal from the District Court of the United  
States for the District of Oregon.

---

**STATEMENT OF JURISDICTION**

**Jurisdiction of the District Court.**

This is a suit brought by Six Wheel Corporation, a corporation, upon a complaint filed May 11, 1946, in the District Court of the United States for the District of Oregon, against R. W. Pointer, residing at Portland, Oregon, and doing business under the fictitious name and style of Pointer-Willamette Co., for infringement of plaintiff's patent No. 1,926,727, issued September 12,



1933, on an application filed January 3, 1927, by one Garner L. Knox and assigned to the said Six Wheel Corporation. Jurisdiction was based upon section 41, paragraph (7), Title 28, U.S.C. (now sections 1338 and 1400 of Title 28). Plaintiff alleges that on September 12, 1933, Letters Patent No. 1,926,727 were duly and legally issued to plaintiff for an invention in Six-Wheel Attachment for Motor Vehicles, and since that date plaintiff has been, and still is, the owner of said Letters Patent; that defendant has been, and still is, infringing said Letters Patent by making, selling and using six-wheel running gears embodying the patented invention and will continue to do so unless enjoined; that plaintiff placed the required statutory notice on all running gears manufactured and sold by it under said Letters Patent, and gave notice in writing to defendant of his infringement. Plaintiff prayed for an injunction against defendant and an accounting for profits and damages (Tr. 2-4).

The appellant by his answer denied committing any acts of infringement of Letters Patent 1,926,727; denied that Letters Patent No. 1,926,727 were duly and legally issued; affirmatively alleged that the patent in suit, and particularly claims 1, 2, 11, 15 and 17 thereof, are invalid and void in that each claim is for a non-patentable aggregation of old elements known, used, invented, described and published prior to the alleged invention or discovery thereof by Garner L. Knox, or more than two years prior to the date of filing of the application for said Letters Patent; affirmatively alleged that the device defined by the claims in suit was not novel or patentable at the time of the alleged invention thereof

by Garner L. Knox, but that said claims were and are invalid and void for the reason that devices covered thereby have been known, used, invented, described and published in publications and patents issued in this and foreign countries more than two years prior to the date of application for said Letters Patent, some of which are listed as follows: United States Patent No. 174,533 to Jeffries, issued March 7, 1876; United States Patent No. 177,156 to Richards, issued May 9, 1876; United States Patent No. 878,156 to Pratt, issued Feb. 4, 1908; United States Patent No. 915,733 to Brillie, issued March 23, 1909; United States Patent No. 924,862 to Warner, issued June 15, 1909; United States Patent No. 1,111,924 to Smith, issued Sept. 29, 1914; United States Patent No. 1,131,118 to Collard, issued March 9, 1915; United States Patent No. 1,147,439 to Pichoud, issued July 20, 1915; United States Patent No. 1,276,687 to Pflager, issued August 20, 1918; United States Patent No. 1,316,369 to Laisne, issued Sept. 16, 1919; United States Patent No. 1,414,147 to Naeser, issued April 25, 1922; United States Patent No. 1,436,031 to Furlong, issued Nov. 21, 1922; United States Patent No. 1,527,987 to McCracken, issued March 3, 1925; United States Patent No. 1,534,458 to Mohl, issued April 21, 1925; United States Patent No. 1,562,265 to Stebbins, issued Nov. 17, 1925; United States Patent No. 1,655,481 to Van Leuven, issued Jan. 10, 1928; United States Patent No. 1,692,891 to Fageol, issued Nov. 27, 1928; British Patent No. 8262 to Spencer, dated April 5, 1906.

As a further and separate answer and defense, appellant alleged that the claims in suit are invalid and

void because, in view of the state of the art and analogous arts, and in view of common knowledge of those skilled in the art, all as known at the time of and long prior to the alleged invention, the subject matter and disclosure of the patent in suit involved nothing more than the exercise of mechanical skill.

As a further and separate answer and defense, appellant alleged that the vehicle suspensions made and sold by him employ no construction in common with or equivalent to the structure defined by the claims in suit except such structures as are old and common property in the art and alike available to appellant and appellee (Tr. 6-13).

### **Jurisdiction of Court of Appeals.**

This is a direct appeal from judgment of the District Court made on June 14, 1948, which was final except for accounting, decreeing that plaintiff is the owner of the entire right, title and interest in and to Letters Patent No. 1,926,727, granted September 12, 1933; that said Letters Patent are good and valid in law with respect to claims 1, 2, 11, 15 and 17 thereof which are the claims in suit; that defendant has infringed Letters Patent No. 1,926,727 and particularly claims 1, 2, 11, 15 and 17 thereof by the manufacture and sale of the FEATHER RIDE structure as exemplified by plaintiff's Exhibit 3-A and defendant's Exhibit 69; that plaintiff have judgment on its complaint for infringement of Letters Patent 1,926,727 as prayed for; directing the issuance of a permanent injunction perpetually restraining the defendant and those in privy with him from

using or selling or threatening to use or offering for sale or threatening to sell or contributing to the use of the combination patented in and by Letters Patent No. 1,926,727 and particularly claims 1, 2, 11, 15 and 17 thereof, or in anywise infringing the patent or upon the rights of the plaintiff under the patent; that the cause be referred to a special master for an accounting of the compensation due plaintiff and to determine attorney's fees to be allowed plaintiff in this cause; that the plaintiff have judgment and execution against defendant for costs (Tr. 25-29). Defendant filed motion for new trial on June 23, 1948 (Tr. 29-30), which was denied by the District Court in its order dated September 23, 1948 (Tr. 46). Thereafter, on October 8, 1948, defendant filed his notice of appeal to the Circuit Court of Appeals for the Ninth Circuit (Tr. 47), and thereafter duly perfected said appeal. Jurisdiction of the Court of Appeals rests upon Section 1292, Title 28, U.S.C.

## STATEMENT OF THE CASE

In January, 1925, one Harry Y. Stebbins brought to Utility Trailer Manufacturing Company a form of six wheel attachment which he requested that company to manufacture for him on a time and material basis (Tr. 71). Mr. Stebbins had no drawings of his rocker arm type of attachment, and showed Mr. Knox by sketches what and how he wanted it built. Mr. Stebbins had made sales of a number of such attachments and wanted immediate delivery (Tr. 71). The attachment designed by Mr. Stebbins and brought by him to Utility Trailer

Manufacturing Company was substantially what is shown in Figure 1 of Letters Patent No. 1,926,727 "if you omit the universal [joint] on the end of the rocker arm and just make a connection there." (Tr. 75). The company permitted Mr. Stebbins to use shop facilities and the service of mechanics to build the attachment embodying his idea (Tr. 80). Mr. Stebbins personally directed mechanics employed by Utility Trailer Manufacturing Company how to build the attachment. Several of the attachments as designed by Mr. Stebbins were built (Tr. 80). Mr. Stebbins used a trade name for the attachment, termed "Simplex", to indicate that the attachment was simple and had few working parts.

The Stebbins attachment comprised a six wheel attachment for motor vehicles and is described as the combination of a [vehicle] frame having leaf springs connected at one end to the vehicle frame, detached from the vehicle [frame] at the opposite ends, or at their ends toward the axle of the attachment, for the purpose of being connected to the ends of rocker arms, hanger brackets secured to the frame, each rocker arm being pivotally supported by one of the brackets, a pin and bushing securing the rocker arm at opposite sides of the frame to the axle of the attachment, and wheels journaled on the axle (Tr. 114-115).

About thirty trucks were equipped with the Stebbins attachment (Exhibit No. 5). Knox was of the opinion that they would not properly perform the work intended, although apparently they were doing so. Mr. Knox believed that a universal or ball joint was required, but was not positive that the Stebbins construction, due to

the method of attaching the brackets to the axle, might not stand up sufficiently well to be satisfactory, and so did not insist on complicating the mechanism until his type had been put into service (Exhibit No. 5, p. 71). Mr. Knox suggested putting in a universal joint where the rocker arm attached to the axle bracket. Mr. Stebbins and Mr. Knox were in agreement that some universal action would be an improvement, but did not want to hold up manufacture of the attachments then in production (Exhibit No. 5, p. 6).

The Stebbins attachment was made during the period of February to April of 1925 (Tr. 76). About the end of April or early in May Mr. Knox first learned that some of the Stebbins attachments were showing excessive wear at the point where Figure 1 of the Knox patent shows the universal.

Utility Trailer Manufacturing Company negotiated with Mr. Stebbins to take over the manufacture and sale of the Stebbins attachment (Tr. 89), and subsequently, on May 21, 1925, an agreement was executed whereby Utility Trailer Manufacturing Company took over the entire business (Tr. 89). Utility Trailer Manufacturing Company paid Mr. Stebbins a royalty for the use of the invention until it bought out his rights entirely (Tr. 123).

In May, 1925, Mr. Garner L. Knox designed a universal connection which could be used for replacement purposes on trucks in operation which had been equipped with the Stebbins attachment and which were showing wear at the point of connection between the axle and the



rocker arm (Tr. 72). Plaintiff's Exhibits 6-B, 6-C and 6-D illustrate the first rocker arm built and installed with the universal joint (Tr. 113). This universal joint comprises bearings disposed at rights angles to each other (Tr. 114). The drawings are dated May 28, 1925.

Defendant stipulated that the Knox invention was conceived March 1, 1925, and was reduced to practice during the early part of June, 1925. Plaintiff accepted the stipulation (Tr. 132).

Utility Trailer Manufacturing Company equipped trailers of its manufacture with the tandem axle suspension (six wheel attachment) shown in the Knox patent from June, 1925 through 1927 or 1928, when it was discontinued (Tr. 104). Trailers now manufactured by Utility Trailer Manufacturing Company are equipped with a tandem axle suspension similar to that shown in the Stebbins and Van Leuven patent No. 1,562,265 (Exhibit No. 52), which structure utilizes a leaf spring over each of the tandem axles, the springs on each side of the vehicle being interconnected by a rocker arm. In the structure now in use the axles are journaled in bearings on which the springs are mounted, and the spring and the bearing for the axle together constitute a universal joint, so that there is a universal joint between each axle and the end of the rocker arm. Transverse tilting of the axle is taken by the springs (Tr. 105-106).

Mr. Harry Y. Stebbins filed application for United States Letters Patent, Serial No. 26,884, filed April 30, 1925, for the structure which is shown in Figure 1 of the Knox patent, except that he employed a pin and



bushing in place of the universal joint disclosed by Knox (Tr. 117). This application was involved in Interference No. 55,455, declared June 10, 1927, which also involved an application for Compensating Truck Springs, filed by Samuel B. Brown, Serial No. 140,958, and an application for Six Wheel Attachment for Vehicles, filed by David L. Van Leuven, Serial No. 9939. Judgment was entered against the party Brown for the reason that his alleged date of conception was subsequent to the filing dates of Stebbins and Van Leuven. Harry Y. Stebbins and Utility Trailer Manufacturing Company, assignee of the Stebbins application, conceded priority of invention to David L. Van Leuven, and consented that final judgment of priority be rendered in favor of said David L. Van Leuven. Priority of invention of the subject matter in issue was awarded to David L. Van Leuven (Tr. 45). The Harry Y. Stebbins application, Serial No. 26,884, was abandoned (Tr. 87). The David L. Van Leuven application, Serial No. 9939, matured as Letters Patent No. 1,655,481. The Stebbins attachment was covered by the Van Leuven patent, which has expired (Tr. 123). The Stebbins structure, which is similar in construction to the structure shown in Figure 1 of the Knox patent in suit, except that it does not employ the universal joint, is now free to anyone.

Mr. Garner L. Knox made application for United States Letters Patent, Serial No. 158,560, filed January 3, 1927, for Six Wheel Attachment for Motor Vehicles (Exhibit 20). The Knox application was involved in Interference No. 55,383, declared June 3, 1927, between said application and Letters Patent No. 1,620,809, grant-

ed March 15, 1927, to Albert H. Fager. The subject matter in issue was defined by counts which now appear as claims 12 and 13 of the Knox patent, which are not in issue in the instant case. Priority of invention was awarded to Garner L. Knox (Exhibit No. 5).

Mr. Knox described his invention as "a modified form of ball joint incorporated in the end of a rocker arm, one end of said rocker arm being connected to a truck spring, and the other end through this ball joint to a six wheel attachment axle." He described the purpose of a six wheel attachment as being "to distribute the load of the truck through four wheels on the rear end, instead of the customary two." The purpose of his specific invention was stated as "to permit independent movement of the wheels of the six wheel attachment relative to the frame of the truck." (Testimony of Garner L. Knox, Exhibit No. 5, p. 2).

The Knox application, Serial No. 158,560, issued as Letters Patent No. 1,926,727, the patent in suit. This suit, alleging infringement of the patent, involves claims 1, 2, 11, 15 and 17, which read as follows:

1. In a six wheel attachment for motor vehicles, the combination of a frame, a pair of hanger brackets secured to the frame, rocker arms pivotally supported by the brackets, means for securing one end of the arms to one end of the springs supporting the rear end of the frame, an axle, universal means for securing the axle at the opposite sides of the frame to the rocker arms, and wheels journaled on the axle.

2. In a six wheel attachment for motor vehicles, the combination of an axle, wheels journaled on the axle, a pair of rocker arms, means for pivotally

supporting the rocker arms intermediate their ends from the vehicle frame, universal swivel connecting means between the axle and one end of each rocker arm, and means for securing the opposite ends of the rocker arms to free ends of the rear springs of the motor vehicle.

11. The combination of a six wheel attachment for motor vehicles of a pair of combined radius and rocker arms, means for pivotally mounting the rocker arms, means for securing one end of each rocker arm to the free end of a spring of the motor vehicle and universal swivel means for securing the opposite end of the rocker arm to the axle of the attachment.

15. In a motor vehicle, an axle having wheels thereon, a frame, springs connected to said frame having one of their ends connected by links to rocker arms, means for pivotally mounting said rocker arms on said frame intermediate their ends, a second axle having wheels thereon, means for connecting said axle to said rocker arms, said means having means permitting said last named axle to have oscillatory movement relative to said rocker arms.

17. A vehicle comprising a frame, an axle, wheels on said axle, a spring mounted on said axle, a second axle, a rocker arm pivoted to said frame, means connecting said last mentioned axle and one end of said rocker arm including a universal joint and means connecting the other end of said rocker arm with said spring.

It is plaintiff's position that:

1. Insofar as distribution of the load is concerned, the front walking beam (Exhibits 3-A and 75) of defendant's Feather Ride suspension and the leaf spring 3 shown in Figure 1 of the Knox patent "are identical" (Tr. 94);

2. That the rubber cushion surrounding the T-casting affixed to the rear axle of the Feather Ride suspension is the equivalent of the universal joint shown and described in the Knox patent (Tr. 96-97); and

3. That the rear walking beam of the Feather Ride suspension corresponds to the rocker arm 8 of the structure shown in Figure 1 of the Knox patent (Tr. 102).

The plaintiff, Six Wheel Corporation, is a patent holding corporation organized in 1927, and was owned jointly by Six Wheels, Incorporated, and Utility Trailer Manufacturing Company. About 1930 or 1932, Utility Trailer Manufacturing Company bought out Six Wheels, Incorporated, so that at the present time Utility Trailer Manufacturing Company is the sole owner of Six Wheel Corporation (Tr. 121). Six Wheel Corporation owns the patent to Stebbins, No. 1,562,265, the patent to Van Leuven, No. 1,655,481, and the patent to Knox, No. 1,926,727.

### **DEFENDANT'S ALLEGED INFRINGEMENT DEVICE**

The defendant's structure is a dual-beam, dual-axle suspension comprising interconnected front and rear walking beams, each carrying an axle for the road wheels of the vehicle. The front walking beam is pivotally connected at its forward end to the vehicle frame, and is pivotally connected at its rear end to the forward end of the rear walking beam. The rear walking beam supports a major proportion of the weight of the ve-

hicle on a trunnion intermediate the ends of the rear walking beam, with the rear axle attached near the rearward extremity of the beam. A resilient assembly comprising nested coil springs is arranged to support the vehicle frame on the rear walking beam trunnion. The various pivotal connections of the two walking beams and the connections between the walking beams and the axles are all rubber cushion mounted in a manner to provide an inherent resilience and flexibility in the system and to obviate the necessity for lubrication of any part of the system. Knox testified that the use of rubber to permit the universal action needed to maintain the required flexibility was a common manner of providing flexible action (Tr. 96). Pursuant to Mr. Knox's testimony in this regard, it is defendant's position that:

1. The use of springs or beams connected at one end to the vehicle frame and connected at their opposite ends to rocker arms for distributing the load to tandem axles, one such axle being mounted midway of the length of the beam or spring and the other such axle being connected to the end of the rocker arm, was known and invented prior to the date of invention by Knox of the alleged invention defined by the claims in suit, stipulated to be March 1, 1925. This use of springs or beams and rocker arms for distributing the load to tandem axles is clearly shown by the device which Mr. H. Y. Stebbins brought to Mr. Knox in January, 1925; by Letters Patent No. 878,156 (Exhibit 32); by Letters Patent No. 1,534,458 (Exhibit 51); Letters Patent No. 1,655,481 (Exhibit 56); and British Patent No. 8262 of 1906 (Exhibit 59).

2. The use of a universal joint as a means for attaching an axle to the free ends of rocker arms was known and invented prior to the date of invention by Knox of the alleged invention defined by the claims in suit, stipulated to be March 1, 1925. This use of a universal joint is clearly shown by Letters Patent No. 878,156 (Exhibit 32); Letters Patent No. 1,111,924 (Exhibit 38); Letters Patent No. 1,131,118 (Exhibit 39); Letters Patent No. 1,316,369 (Exhibit 45); Letters Patent No. 1,527,987 (Exhibit 50); and Letters Patent No. 1,692,891 (Exhibit 58).

## **SPECIFICATIONS OF ERROR**

Appellant relies upon each of the errors assigned by him in the Statement of Points, filed December 22, 1948 in the District Court, as amended by striking therefrom paragraph numbered (6) (Tr. 53-56).

For convenience of the Court these assignments may be grouped and discussed by groups rather than individually.

Group I. Error of the District Court in holding claims 1, 2, 11, 15 and 17 of the Knox patent valid as not being anticipated by the prior art. Statement of Points, paragraphs numbered 2, 3, 4, 12, 13 and 17.

Group II. Error of the District Court in failing to find that each of claims 1, 2, 11, 15 and 17 of the Knox patent is invalid and void in that each of said claims defines a non-patentable aggregation of elements known, used, invented, described and published prior to March



1, 1925. Statement of Points, paragraphs numbered 3 and 16.

Group III. Error of the District Court in holding that defendant's structure, exemplified by Exhibits Nos. 3-A and 69, infringes claims 1, 2, 11, 15 and 17 of the Knox patent. Statement of Points, paragraphs numbered 1, 10, 11 and 14.

Group IV. Error of the District Court in holding that the alleged invention disclosed in the Knox patent was the sole invention of Garner L. Knox. Statement of Points, paragraphs numbered 7, 8, 9, 12 and 13.

Group V. Error of the District Court in failing and refusing to grant defendant's motion to amend his pleadings to include the defense of invalidity of Letters Patent No. 1,926,727 on the ground that the invention of the Knox patent in suit was not the sole invention of Garner L. Knox, but was a joint invention of Garner L. Knox and Harry Y. Stebbins. Statement of Points, paragraphs numbered 7 and 8.

Group VI. Error of the District Court in not finding that the subject matter defined by claims 1, 2, 11, 15 and 17 of the Knox patent did not involve patentable knowledge or invention, and involved nothing more than the exercise of mechanical skill. Statement of Points, paragraph 18.

Group VII. Error of the District Court in adopting the Conclusion of Law that plaintiff-appellee is entitled to a judgment for an injunction and accounting with costs and attorneys fees, and in rendering such judgment

and issuing a permanent writ of injunction. Statement of Points, paragraph 15.

## POINTS AND AUTHORITIES ON ASSIGNMENTS OF ERROR GROUP I

A patent for a combination should be narrowly construed. The inventor is entitled only to a range of equivalents commensurate with the scope of his invention. A patentee is not entitled to a construction of his claims such that it will bring within their scope a construction which is more akin to the prior art than it is to the device of the patentee.

*Brill v. Washington Railway Co.*, 215 U.S. 527;  
54 L. Ed. 311; 30 S. Ct. 177.

*Elliott Machine Co. v. P. P. Appeldoorn's Sons  
Co.*, 267 F. 983 (C.C.A. 6th Cir.).

*Troy Wagon Works Co. v. Ohio Trailer Co.*, 272  
F. 850 (C.C.A. 6th Cir.).

*H. D. Hughes, et al. v. Magnolia Petroleum Co.*,  
88 F. (2d) 817; 33 P.Q. 9.

*In re Au*, 362 O.G. 4.

*In re Kehl*, 101 F. (2d) 193; 40 U.S.P.Q. 357; 26  
C.C.P.A.; 502 O.G. 6.

## ARGUMENT

About 1920 and following the first World War, the federal, state and local governments began an active program of construction of hard surfaced roads to keep pace with the increase in use of motor vehicles as a means of transportation, both for passengers and for

freight. There was a tendency to haul larger and larger loads, and this tendency soon outstripped the capacity of the roads. Persons in the business of hauling freight by motor vehicle, in an effort to increase their pay loads and net income return, were either inadvertently or deliberately increasing the loads to weights which taxed and exceeded the road capacity, and it became necessary to enact laws and ordinances limiting the load per wheel.

One obvious answer, both to the fundamental problem and to enable compliance with state laws and municipal ordinances, was to increase the number of wheels per vehicle. A standard solution was to provide an auxiliary axle with two additional wheels to convert four-wheel motor freight vehicles to six-wheel vehicles. A number of patents were issued throughout the years preceding the Knox invention, providing such six-wheel attachments. These prior art patents, listed below, as well as the Knox patent in suit, illustrate alleged inventions of this type, and the activity in the art at the time.

Exhibit No.	Patentee	Patent No.	Application filed	Patent issued
32	Pratt	878,156	Apr. 10, 1907	Feb. 4, 1908
35	Brillie	915,733	Nov. 7, 1907	Mar. 23, 1909
48	Furlong	1,436,031	May 9, 1921	Nov. 21, 1922
51	Mohl	1,534,458	Aug. 14, 1923	Apr. 21, 1925
52	Stebbins et al.	1,562,265	Feb. 23, 1924	Nov. 17, 1925
56	Van Leuven	1,655,481	Feb. 18, 1925	Jan. 10, 1928
58	Fageol	1,692,891	Apr. 23, 1923	Nov. 27, 1928
	Stebbins (Serial No. 26,884)		Apr. 30, 1925	
59	Spencer (British)	8,262		Apr. 5, 1906
1	Knox	1,926,727	Jan. 3, 1927	Sept. 12, 1933
(Conceived about Mar. 1, 1925)				

The problem of distribution of the load to four or more wheels of a vehicle and to enable the wheels to accommodate themselves to irregularities on the road surface, is quite old in the art, extending back at least to 1876, as exemplified by Patent No. 174,533, issued to Jeffries (Exhibit No. 30) for a car-truck; and also as illustrated in British Patent No. 8262 of 1906 to Spencer for improvements in bogies for railway vehicles and the like. Six-wheel motor vehicles are shown as early as 1908 in Patent No. 878,156, issued to Pratt (Exhibit No. 32).

Each of the above named prior art patentees, and Knox, have obtained a patent for a purported contribution to the art in the matter of overcoming incidental problems introduced in connection with the redistribution of the load from four wheels to six wheels.

The patentee, Knox, describes and classifies his invention in his patent (page 1, col. 1, lines 1-8) as follows:

“This invention relates to six wheel attachments for motor vehicles and is more particularly directed to a six wheel attachment for trucks, buses and the like, for distributing the load carried by the motor vehicle to the added wheels, to remove from the rear wheels of such motor vehicle a portion of the load customarily carried thereby.”

The only object specifically stated in the Knox patent (page 1, column 1, lines 21-28) is:

“to provide a six-wheel attachment for motor vehicles, which attachment includes a universal swivel connection between the axle of the six wheel attachment and the motor vehicle frame, so as to per-

mit the wheels to traverse the roadway and be maintained on the roadway irrespective of the road irregularities."

Plaintiff-appellee contended in the lower court for the benefit of the doctrine of equivalents in reading claims of its patent on the defendant's structure, contending that the trunnion rubber bushing mounted in a journal box surrounding the axles of the defendant's structure was known to be the equivalent of the ball and socket universal joint illustrated in the Knox patent (Finding of Fact No. 10) (Tr. 21). Plaintiff's witness Knox testified that the following constructions were used as universal joints, or would provide universal action between the rocker arm and the axle of the attachment:

(1) In the **FEATHER RIDE** construction the T-casting, welded to the axle and surrounded by rubber to permit the axle to tip relative to the rocker arm (Tr. 96-97).

(2) Rubber is frequently used to provide for flexible action—as in a universal joint of an automobile (Tr. 96).

(3) A spring mounted on a journal which is free to turn on the axle is a universal connection, transverse tilting of the axle being taken by the springs (Tr. 106).

(4) A rubber block interposed between the rocker arm and the axle of the attachment would constitute a universal joint (Tr. 107).

(5) A complete ball joint (Tr. 109).

(6) A cylinder inside of a ball (Tr. 109).

(7) A leaf spring is the equivalent of a universal

joint (Tr. 113).

(8) The first universal joint embodying the Knox invention was made of bearings disposed at right angles to each other (Tr. 113-114).

Pursuant to this testimony, types of universal joints described by Mr. Knox are illustrated in the following Letters Patent, where they are shown as providing universal action between a rocker arm and an axle of an automotive vehicle in a six-wheel type of chassis for motor vehicles.

The patent to Fageol, No. 1,692,891, for which application was filed April 23, 1923, contains the following disclosure:

"As the vehicle travels along a road, one wheel may run over an elevation throwing one side of the axle upwardly and the connection between the bolster and the axle is such, that this action can take place without subjecting the bolster to strains. This is accomplished by inserting a block of resilient material 14, such as rubber, between the axle and the bolster. \* \* \* The interposition of the block of conformable material, between the bolster seats 16 and the axle, also permits the axle to assume varying angular positions in the vertical plane, by deforming the blocks, without subjecting the bolster to strain." (Tr. 557-558)

The patent to Pichoud, No. 1,147,439, (Tr. 507) shows springs mounted on journals which are free to turn on the axles. Pichoud says that this construction "will distribute the weight load or strain equally upon the springs and insure a smooth and even riding of the vehicle." (Tr. 509). The patent to Brillie, No. 915,733,



(Tr. 487) shows rocker arms o-n pivotally connected to the springs for the rear axle, the springs being secured to the rear axle by means of a pivotal connection r'. Brillie states that a like pivotal connection as between each rear spring and the rear axle can be equally well applied to the intermediate axle i. The structure is provided to overcome difficulties encountered when a single wheel is vertically displaced by encountering an obstacle.

Pratt 878,156 (Tr. 480) shows a globular enlargement on the axle received in a ball bearing provided in the end of the lever 9.

In addition to the above, other forms of universal joints by means of which vehicle axles are secured to rocker arms are disclosed by the patents before the court, as follows:

A universal joint formed by bearings disposed at right angles to each other is shown in the patent to Collard, No. 1,131,118 (Tr. 503). Smith 1,111,924 (Tr. 497) discloses trunnions 17 mounted in bearings 18 disposed at right angles to the bearing for the axle 12. In the patent to Pflager 1,276,687 (Tr. 512), transverse tilting of the axle is provided in that the springs 16 are mounted for rocking movement upon suitable bearing blocks 18, the latter being positioned on the journal boxes 14 for the axles. Laisne 1,316,369 (Tr. 519) discloses a rocker arm c pivotally mounted on the frame b<sup>2</sup> and having means for securing one end of the rocker arm to one end of the spring supporting the rear end of the frame, and an enclosed ball joint for securing the op-

posite end of each rocker arm to the corresponding axle. The patent to Naeser 1,414,147 (Tr. 524) discloses another form of universal joint provided by bearings disposed at right angles to each other. In Furlong 1,436,031, (Tr. 528) the axles 28 and 34 are connected to the ends of rocker arms 4 by universal means comprising a chain. In this patent the bracket 2, equalizing bar 4, chain 36, chain 33 and springs 31 and 35 supply the elements called for by the claims of the patent in suit, which read:

“a pair of rocker arms, means for pivotally supporting the rocker arms intermediate their ends from the vehicle frame, universal swivel connecting means between the axle and one end of each rocker arm, and means for securing the opposite ends of the rocker arms to free ends of the rear springs of the motor vehicle.”

In the patent to McCracken, et al., 1,527,987, (Tr. 534) the universal joint takes the form of a bearing for the rear axle 12 provided with studs 22 which are journaled in the yoke 21. The patent to Stebbins, et al., 1,562,265 (Tr. 542) illustrates a construction wherein transverse tilting of the axle is taken by the springs. The patent to Van Leuven 1,655,481 (Tr. 547) illustrates another construction in which transverse tilting of the axle is taken by the springs. Note that claims 11 and 12 of the Van Leuven patent read on the structure illustrated in Figure 1 of the Knox patent in suit. Should appellee object that claim 11 calls for a *spring* in place of the rocker arm, it must be remembered that Knox testified:

“As far as distribution of the load is concerned, a beam and a spring are identical.” (Tr. 94)

Also that:

“Transverse tilting of the axle is taken by the springs.” (Tr. 106)

It should be remembered that Mr. Knox testified that these elements, which appellant has found illustrated in the prior art, are equivalents of the universal joint employed in the Knox structure. It should likewise be remembered that in the patents to Pratt 878,156; Brillie 915,733; Pflager 1,276,687; Furlong 1,436,031; Stebbins, et al., 1,562,265; Van Leuven 1,655,481; Fageol 1,692,891; and British 8262 of 1906, these elements are employed in vehicle suspensions as universal swivel connecting means between rocker arms and axles for the purpose of providing flexibility in the distribution of the load from four wheels to six wheels.

The patent to Brillie 915,733 shows a six wheel attachment for motor vehicles in which the axle of the attachment is connected to the rocker arm on by means of a leaf spring and pivoted connection. The patents to Smith 1,111,924, Collard 1,131,118, Laisne 1,316,369, and McCracken, et al., 1,527,987, each illustrates a universal connection between the rocker arm and the vehicle axle, the opposite ends of the rocker arms being secured to free ends of the springs of the vehicle. The patent to Van Leuven 1,655,481, for which application was filed February 18, 1925, covers a six wheel type of chassis in which an attachment is provided for converting a four wheeled vehicle into a six wheeled vehicle.

The patent structure was prior to Knox, the application having been filed prior to the date of conception of the Knox invention. In *Six Wheel Corporation v. Sterling Motor Truck Co. of California*, 40 F. (2d) 311, the plaintiff corporation, as assignee of Patent No. 1,655,481, sought an injunction and damages against defendants for alleged infringement of said Letters Patent. The claims in issue were the tenth and twelfth claims of the patent. District Judge McCormick said:

"The main contention of complainant is that these claims should be given broad construction because of the advance in the art that was wrought by Van Leuven in the invention covered by the patent herein. I cannot agree with this contention. \* \* \* Of course, if the invention is in fact generic, and if the patent, in view of the state of the prior art, should be raised to the dignity of a pioneer patent, then the claims thereof should be broadly interpreted and construed so as to render to the inventor all legitimate fruit of his concept, but, in my opinion, no such construction is justified in this suit, in view of the prior patents submitted in evidence and in view of the conduct of Van Leuven in participating in an application for patent that was issued to him and one Stebbins November 17, 1925, being No. 1,562,265, for a six wheel truck.

"It is clear to me, in view of Lewis 865,599, Brillie 915,733, Warner 924,862, Furlong 1,454,162, and Stebbins and Van Leuven 1,562,265, that claims 10 and 12 are not entitled to broad construction so as to read upon any device that the evidence in this case shows to have been manufactured, sold or used by any of the defendants herein. I think that Van Leuven and his assignee are not shown to be entitled to completely monopolize the six wheel running gear attachment field because of the grant of the patent in suit. The prior art is such that complainant should be restricted to the specific

devices and combinations shown by the drawings and specifications of the patent in suit and, in such event, neither of the claims sued on read upon the structures or attachments of defendants, as shown by the evidence herein."

To summarize: The patentee Knox did not invent a six wheel attachment for motor vehicles: all of the structure shown in Figure 1 of the patent in suit, with the exception of the universal joint, had been presented to Knox by Harry Y. Stebbins. Knox did not invent a universal joint: The first universal joint which he used in the Stebbins structure was in the form of bearings disposed at right angles to each other as in Collard 1,131,118. Knox admits that a number of other elements would provide the required oscillatory movement: and appellant directs attention to the fact that each of the named elements was disclosed by prior art patentees for the purpose of providing flexibility of movement between the free end of the rocker arm and the axle of the attachment in a six wheel type chassis.

## POINTS AND AUTHORITIES ON ASSIGNMENTS OF ERROR GROUP II

The first negative rule of invention is that it does not involve invention to utilize an element or expedient which is old in the same or in an analogous art, unless the old element or expedient, in its new environment, performs some distinctly new function, or is the cause of some distinctly new and useful result or advantage.

*E. Clemens Horst Co. v. Gibbens & Blodgett, et al.*, 50 F.S. 607; 57 U.S.P.Q. 367.

*In re Cook*, 134 F. (2d) 494; 57 U.S.P.Q. 120.

*Willamette Hyster Co. v. Pacific Car & Foundry Co.*, 122 F. (2d) 492; 50 U.S.P.Q. 422.

*Grinnel Machine Co. v. Johnson Co.*, 247 U.S. 426, 432.

*Samuel Eagle, et al. v. P. and C. Hand Forged Tool Co.*, 74 F. (2d) 918; 24 U.S.P.Q. 181.

*Dallas Machine & Locomotive Works, Inc. v. Willamette Hyster Co., et al.*, 112 F. (2d) 623; 46 U.S.P.Q. 12.

*Lincoln Co. v. Stewart Warner Corp.*, 303 U.S. 545; 37 U.S.P.Q. 1.

*Hailes v. Van Wormer*, 87 U.S. (20 Wall.) 353.

One who merely substitutes an element in a combination invented by another may not claim the combination.

*Willamette Hyster Co. v. Pacific Car & Foundry Co., et al.*; *Pacific Car & Foundry Co. v. Willamette Hyster Co.*, 122 F. (2d) 492; 50 U.S.P.Q. 422.

*Thomas & Betts Co., et al. v. Steel City Electric Co.*, 122 F. (2d) 304; 50 U.S.P.Q. 230.

*Timken Detroit Axle Co. v. Cleveland Steel Products Corp.*, 148 F. (2d) 267; 65 U.S.P.Q. 76.

## ARGUMENT

The patentee Knox acknowledges that the conception and reduction to practice of the Stebbins structure was prior in time to the Knox invention. Knox's sole contribution to the device claimed in his patent was the substitution of a modified universal joint for the simple hinge link of Stebbins for securing the rocker arm to



the axle of the attachment. Knox concedes that the universal joint per se was old and well known in the art. Also, he names a considerable number of elements which he says are equivalent to a universal joint, each of which, likewise, was old and well known in the art at the time of the Knox invention. Moreover, the patents to Pratt 878,156, Brillie 915,733, Pflager 1,276,687, Furlong 1,436,031, Stebbins, et al. 1,562,265, Van Leuven 1,655,-481, Fageol 1,692,891, and British 8262 of 1906, each discloses the use of a universal joint or equivalent means between a rocker arm pivotally mounted on the vehicle frame and the axle of the attachment.

No novel idea was developed in combining the Stebbins structure and the particular universal joint selected by Knox, and Knox made no patentable invention, irrespective of the worth of the improvement.

The manner of securing a vehicle axle to the free ends of rocker arms by means of universal joints, and the reason for so doing, is disclosed and taught by the patents to Smith 1,111,924, Collard 1,131,118, Laisne 1,316,369, and McCracken, et al. 1,527,987. Since most of the elements were already in combination and already well known, singly or in groups, as common expedients in similar situations, the substitution for the simple hinge link of any one of the several forms of universal joints familiar to mechanics for analogous use, can hardly be said to justify the patent. The combination of the Stebbins structure and the universal joint did not produce some new result going beyond that which may have been achieved by mere mechanical skill in operating the elements disclosed by the prior art. In

fact, the required teaching is to be found in any of the patents covering a six wheel type chassis in which a universal joint or an equivalent structure is provided between the axle of the six wheel attachment and the motor vehicle frame.

The claims in suit define the invention as "in combination" all of the elements of the structure brought to Knox by Stebbins, except that in place of the simple hinge link provided by Stebbins between the rocker arm and the axle of the attachment Knox substituted a "universal swivel means" to provide for greater flexibility of movement of the parts connected thereby.

In the case of *E. Clemens Horst v. Gibbens & Blodgett, et al.*, supra, it being determined that a separator belt was the only element invented by the patentee, District Judge Welch of the District Court N. D. California, N. Div., held the patent invalid, saying:

"The claim of the separator patent did not cover the separating belt alone. The separating belt was one of a combination of elements none of which performed any new or different function in the claimed combination over that performed by these same elements as shown in combination in the expired patent to Horst No. 1,054,119."

Holding invalid a patent claiming a combination in a mining drill coupling of old elements and the patentee's improved latch, the Court of Customs and Patent Appeals, in *In re Cook*, 57 U.S.P.Q. 120; 134 F. (2d) 494, stated:

"Appellant claims to have made an improvement in the particular kind of bolt or latch device which

goes into the hole or well. The improvement, obviously, is not in a new combination. His improvement fits into the combination in the same manner as other latch or bolt devices fit into the combination. As a combination, he obtains no new results, and *if he otherwise obtains any new result, it flows from his latch improvement*. The old elements of the combination perform their function in the same old way. There is no new co-action between parts of the combination."

In *Timken-Detroit Axle Co. v. Cleveland Steel Products Corp.*, 65 U.S.P.Q. 76; 148 F. (2d) 267, the Circuit Court of Appeals, Sixth Circuit, held that Powers' substitution of metal for a ceramic rim in an oil burner did not justify his claim to the entire combination:

"At most the claimed invention is merely the improvement of one element of an old combination the construction and operation of which are otherwise unchanged, and does not entitle the patentee to a repatent of his old invention by claiming that an improved element is substituted for an old element."

Similarly, Knox merely provided an improved connection to replace the simple hinge link connection in the Stebbins structure, the remaining elements of the combination performing no new function.

In *Willamette-Hyster Co. v. Pacific Car and Foundry Co.*, 50 U.S.P.Q. 422; 122 F. (2d) 492, the Circuit Court of Appeals, Ninth Circuit, observed that Wickes and Neil averred, in their disclaimer to certain matter in their patent, that they did not invent the combination shown in Meister's patent, but, notwithstanding, claimed

the entire combination with one element substituted. The Court stated:

“To thus concede the invention of a combination to have been made by another and, nevertheless, to claim the entire combination with the substituted element invalidated the patent claim, under the rule announced in *Rogers, et al. v. Alemite Corp.*, 298 U.S. 415 (29 U.S.P.Q. 311), and reasserted in *Lincoln Engineering Co. v. Stewart-Warner Engineering Corp.*, 303 U.S. 545 (37 U.S.P.Q. 1).”

From Knox's testimony it is clear that he recognizes Stebbins' prior conception of the structure claimed in his patent with the exception of the substitution of a universal swivel connection for the simple link connection.

Circuit Judge Jones of the Circuit Court of Appeals, Third Circuit, in the case of *The Thomas & Betts Co., et al. v. Steel City Electric Company*, 50 U.S.P.Q. 230; 122 F. (2d) 304, held invalid claims for a combination with an armored cable of an insulating bushing and a connector. He stated:

“What Fullman did was to make a slight change (an improvement, it may be allowed) in the outer end of the connector. But that is not the invention for which he makes claim. By substituting his connector, he seeks to extend his monopoly to an invention of all the elements in combination. This he may not do unless his improved element and the other old elements in combination perform a new and useful function or operation. A patentee may not, merely by improving one element of an old combination whose construction and operation are otherwise unchanged and which performs no new or different use or function, patent the old combination by claiming it in combination with the im-

proved element. *Bassic Mfg. Co. v. R. M. Hollingshead Co.*, 298 U.S. 415, 425 (29 U.S.P.Q. 311, 315, 316); *Stewart-Warner Corp. v. Rogers*, 104 F. (2d) 762, 763 (40 U.S.P.Q. 391, 392) (C.C.A. 3)."

Mr. Knox improved upon the simple link connection in the Stebbins structure and then claimed as his invention the entire structure by incorporating his improved link (a modified universal joint) therewith.

In *Lincoln Engineering Co. of Illinois v. Stewart-Warner Corp.*, 37 U.S.P.Q. 1; 303 U.S. 545, the Supreme Court of the United States held invalid claims to a combination of a lubricant compressor, a coupling member and a headed nipple, said combination being adapted for lubricating automotive bearings. Mr. Justice Roberts, in delivering the opinion of the Court, stated the case to be similar to that of *Rogers v. Alemite Corp.*, reported with *Bassick Mfg. Co. v. Hollingshead Co.*, 298 U.S. 415 (29 U.S.P.Q. 311), and the decision therein applied here. It was stated thus:

"The invention, if any, which Butler made was an improvement in what he styles in his specifications the 'chuck' and in claim a 'coupling member'. \* \* \* As we said of Gullborg in the Rogers case, having hit upon this improvement he did not patent it as such but attempted to claim it in combination with other old elements which performed no new function in his claimed combination. The patent is, therefore, void as claiming more than the applicant invented. The mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention. And the improvement of one part of an old combination gives no right to claim that improvement in com-

bination with other old parts which perform no new function in the combination.” (citing many cases)

The decision of the Circuit Court of Appeals, Ninth Circuit, in *Dallas Machine & Locomotive Works, Inc. v. Willamette Hyster Co., et al.*, 112 F. (2d) 623; 46 U.S. P.Q. 12, furnishes an outline of the manner in which the claims in suit may be read on the prior art. Taking claim 1 of the Knox patent as the example, and following the procedure adopted by Circuit Judge Haney, we arrive at the following conclusions:

The claim introduces the subject matter as being: “In a six wheel attachment for motor vehicles”: We need look no further than the structure brought by Harry Y. Stebbins to Mr. Knox in January, 1925, and which is illustrated in Figure 1 of the drawings of the Knox patent, save that Knox has substituted a modified universal joint where Stebbins had employed a simple hinge pin.

*The combination of a frame.*

All of the motor vehicles in the prior art have “a frame”.

*A pair of hanger brackets secured to the frame.*

These are the brackets upon which the rocker arms are pivotally supported. All of the patents relied upon by appellant on appeal illustrate and describe brackets secured to the frame and upon which rocker arms are pivotally supported.

*Rocker arms pivotally supported by the brackets.*

Each of the patents relied upon by appellant illus-



trates and describes a rocker arm pivotally supported by hanger brackets secured to the vehicle frame.

*Means for securing one end of the arms to one end of the springs supporting the rear end of the frame.*

In the structure illustrated in the patent to Knox this element is the spring hanger 9 by which the rocker arm 8 is pivotally secured to the forward free end of the spring 3. A similar element, or the full mechanical equivalent thereof, is illustrated and described in each of at least \*sixteen of the patents hereinabove referred to and relied upon by appellant on appeal.

*An axle.*

This is the axle of the attachment, and in the structure illustrated by Knox is the axle 10 or, in the modification illustrated in Figure 7, the axle 10a. Such an axle (in a six wheel attachment for motor vehicles) is illustrated in the patents to Furlong 1,436,031, Mohl 1,534,458, Stebbins 1,562,265, Van Leuven 1,655,481, British 8262 of 1906.

*Universal means for securing the axle at the opposite sides of the frame to the rocker arms.*

Each of the patents to Pratt, Smith, Collard, Pichoud, Laisne, Naeser, McCracken and Van Leuven illustrates and describes "universal means" for securing the axle at opposite sides of the frame to rocker arms; and in each instance the "means" employed has been described by plaintiff's witness Knox as being the full equivalent of a universal joint. Moreover, the patentees listed describe these "universal means" as performing the same

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\*The patents to Pratt and Fageol do not disclose this particular element.

function as claimed for the universal joint in the Knox patent.

In Brillie the rear axle is secured to the rocker arm by means of the rear spring and a pivotal connection. In Furlong the axle is secured to the rocker arms by means of leaf springs and chain links. In Stebbins, et al., and in Van Leuven the axle is secured to the rocker arms by means of leaf springs.

The universal joint illustrated in the Knox patent performs no different function than it does in any of the structures illustrated by the patentees listed in the immediately preceding paragraphs. Its sole purpose is as expressed by various ones of those patentees:

Pratt: "provides a flexible and to a limited extent universal joint or bearing as between the rear end of the side lever 9 and the rear axle."

Smith: "if one wheel only rises over a lump on the roadway, the axle can freely tip at that end without strain on the lever 8, the trunnion 17 permitting this movement."

Collard: "The swivel connections between the long arms of the bell cranks and the axles permit any of the wheels rising independently of the others without causing any torsional strain."

Laisne: "The outer end of each lever c is connected by means of a universal joint, for instance an enclosed ball joint, to the corresponding axle."

Naeser: "The spring 5 prevents longitudinal movement of the axle, but otherwise the latter has universal movement."

McCracken: "provide a universal joint connection between the levers abutting one of such springs and the axle."

Fageol: "one wheel may run over an elevation throwing one side of the axle upwardly \* \* \*. This is accomplished by inserting a block of \* \* \* rubber between the axle and the bolster."

As stated by Circuit Judge Haney, in *Dallas Machine & Locomotive Works, Inc. v. Willamette Hyster Co.*, supra:

"We believe, therefore, that the applicable rule is the one stated in *Lincoln Co. v. Stewart-Warner Corp.*, 303 U.S. 545, 549 (37 U.S.P.Q. 1), that the mere aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than that theretofore performed or produced by them, is not patentable invention'. The rule is more fully stated in *Hailes v. Van Wormer*, 87 U.S. (20 Wall.) 353, 368, as follows:

'It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained,

can prevent others from using some of the devices, omitting others, in combination.' ”

From a consideration of the decisions cited above, the position of the courts is clear, and it is generally acknowledged that the improvement of one part or element of an old combination gives no right to claim that improvement in combination with other old parts or elements which perform no new function in the combination. In the case under consideration, Mr. Knox has testified that his contribution to the improvement of the Stebbins six wheel attachment is the substitution of a universal connection for the simple link provided by Stebbins. Thus, it appears clear that Knox's "invention" is not in the *combination* of elements but rather in the improvement of a single element of the combination by reason of his substitution therefor of a universal joint. It is submitted that the claims of the Knox patent in suit should have been limited to his improvement and that, since he was not the inventor of the combination claimed, the patent is void as claiming more than the patentee invented.

### POINTS AND AUTHORITIES ON ASSIGNMENT OF ERRORS GROUP III

That defendant's machine accomplishes the same result as complainant's patented device does not show infringement, where there is a variation in the means used.

*Stebler v. Porterville Citrus Ass'n*, 248 F. 927.  
*Petroleum Rectifying Co. of Calif. v. Reward Oil Co.*, 260 F. 183.

*Diamond Power Specialty Co. v. Merz Capsule Co.*, 276 F. 274.

*Superior Skylight Co. v. Zerbe Const. Co.*, 5 F. (2d) 982.

*Stoehrer & Pratt Dodge Corp. v. Lusse Bros.*, 7 F. (2d) 87.

*Automatic Appliance Co. v. McNiece Motor Co.*, 20 F. (2d) 578, 583.

*Fairbanks, Morse & Co. v. American Valve & Meter Co.*, 31 F. (2d) 103.

*Craftint Mfg. Co. v. Baker, et al.*, 94 F. (2d) 369; 36 U.S.P.Q. 164.

If a patent reads upon an offending apparatus infringement is suggested, although not proved, but there is no infringement if the claim will not read upon that which is said to infringe.

*Goeghegan v. Ernst*, 256 F. 670.

*Tostevin-Cottie Mfg. Co. v. M. Ettinger Co., Inc.*, 254 F. 434.

That parts of defendant's machine and of plaintiff's machine are not interchangeable indicates non-infringement.

*Diamond Match Co. v. Sun Match Corp.*, 16 F. (2d) 1.

*Auto Hone Co. v. Hall Cylinder Hone Co.*, 3 F. (2d) 479.

If defendant's activities fall within the scope of the prior art he cannot be regarded as an infringer of plaintiff's patent.

*Ingersoll Steel & Disc. Co. v. Budd Wheel Co.*, 67 F. (2d) 753; 19 U.S.P.Q. 231.

*Eastman Oil Well Survey Co. v. Sperry-Sun Well Surveying Co.*, (C.C.A. 5) 131 F. (2d) 884; 56 U.S.P.Q. 5.

## ARGUMENT

### *Comparison of Plaintiff's and Defendant's Devices.*

The device illustrated in the patent in suit comprises leaf springs 3, each having one end secured to the vehicle frame 1 by any suitable means such as a spring hanger, and being detached from the vehicle frame at the opposite end, or at its end toward the axle of the attachment, for the purpose of being connected to the end of a rocker arm 8. Hanger brackets 6 are secured to the frame and pivotally support the rocker arms. The rocker arms are connected at one end to the springs 3 and at the other end to the axle of the attachment by a universal joint between the end of each rocker arm and the axle. In Figure 1 of the patent in suit, the rocker arm is not attached directly to the axle of the attachment, a yoke 15 being interposed therebetween.

Defendant's device comprises a front walking beam pivotally attached at one end to the frame of the vehicle and having its other end connected to the forward end of the rear walking beam by means of shackle links. Midway of the length of the front walking beam an axle is secured to the beam by means of a T-casting. The vertical portion of the T-casting is welded to the axle and the cross-arm of the T-casting is received in a housing in the mid portion of the beam where it is mounted in rubber. Two thirds of the length of the



rear walking beam is a trunnion as an integral part of the rear walking beam. Mounted on this trunnion is a spring rider on which are supported nests of coil springs and a snubber. The upper end of the coil springs and the snubber are received into brackets secured to the frame. A second axle is secured to the rear end of the rear walking beam by means of a T-casting welded to the axle and received in the housing in the walking beam where it is mounted in rubber.

In the Knox structure the means for distributing the load customarily carried by the rear wheels 4 to an auxiliary pair of wheels 5 comprises a pair of hanger brackets 6 which pivotally support rocker arms 8. Spring hangers 9 secure one end of each rocker arm to the forward free ends of the springs 3. To add the six wheel attachment embodying the Knox invention to a vehicle, one end of the rear spring on each side of the vehicle is detached from the vehicle and secured by means of spring hangers to one end of a rocker arm. The rocker arm on each side of the vehicle is pivoted intermediate its ends upon hanger brackets, the end of the rocker arm opposite the spring hanger 9 being connected to the axle of the attachment by a universal swivel connection.

Exhibit 75 shows the construction and mode of operation of defendant's FEATHER RIDE suspension. A single axle suspension consists of the rear walking beam and coil spring assembly, the forward end of the beam being connected to the vehicle frame by means of the front bracket A. When the single axle suspension is converted to tandem axle suspension, the forward end

of the rear walking beam is detached from bracket A, the front bracket A is removed and the forward end of the rear walking beam is connected to one end of the front walking beam. The forward end of the front walking beam is connected to the vehicle frame by means of a bracket. The axle of the attachment is mounted midway of the length of the front walking beam.

Plaintiff's witness Knox testified that as far as distribution of the load is concerned a beam and a spring are identical (Tr. 94). Mr. Knox testified that the front walking beam of the FEATHER RIDE suspension is the equivalent of the leaf spring 3 in the Knox structure (Tr. 101) saying: "The front beam is identical in lever action to the spring 3" (Tr. 102). Mr. Knox further testified that the blocks of rubber surrounding the T-head within the housings provided in the walking beams "permits the axle to tip relative to the walking beam" and so provides "universal action" (Tr. 96-97).

In other words, Mr. Knox testified that plaintiff's and defendant's devices *function alike* by reason of the fact that either a spring or a beam may be employed to distribute the load to the tandem axles, and the further fact that the rubber blocks which surround the T-casting in the housings in the walking beam "permit the axle to tip relative to the walking beam". Defendant's witness Alden W. Mackie testified that *in operation* the FEATHER RIDE structure and the Knox structure are alike (Tr. 142).

Notwithstanding that the operation of plaintiff's and defendant's devices are alike in that in each the load

carried by the vehicle is distributed to the wheels mounted on tandem axles and the rubber blocks permit the axles to tip relative to the walking beams, nevertheless there is a considerable variation in the elements employed in the two structures. Defendant's front walking beam is not a *spring*. Under maximum load of 27,000 pounds, the front walking beam of the FEATHER RIDE suspension was deflected only five-sixteenths inch (Exhibit 22—measurement "B" between axle beam and the bed of testing machine).

In the FEATHER RIDE suspension springing of the vehicle is provided by the nests of coil springs supported by the spring riders which rest on trunnions intermediate the ends of the rear walking beams. Notwithstanding that Mr. Knox testified that the front walking beam in the FEATHER RIDE structure is a spring, he testified also that the FEATHER RIDE structure, minus the coil springs, would not be permitted on highways in most states. He stated that if the coil springs were removed from the FEATHER RIDE suspension there would be no springs in the suspension (Tr. 126). It is clear, therefore, that his testimony to the effect that the front walking beam of FEATHER RIDE is a spring was in error.

Plaintiff's witness Knox and defendant's witness Alden W. Mackie both testified that the rear walking beam and spring cluster mounted on the rear walking beam in the FEATHER RIDE suspension is the equivalent of a leaf spring (Tr. 95 and 149); and that in converting a single axle suspension to a dual axle suspension, a rigid [front] walking beam is added, as illus-

trated on Exhibit 75. Plaintiff failed to establish that defendant ever manufactured, sold, or authorized the use of a structure in which the rear walking beam of the FEATHER RIDE suspension was connected to a spring.

In the Knox structure, one end of the rocker arm 8 is connected to spring 3, and the other end is connected to the axle of the attachment. The rocker arm 8 is pivoted midway of its length and its ends are free to follow movement of the axle as the wheels follow the contour of the roadway. In the FEATHER RIDE suspension, since the rear walking beam and spring cluster is the equivalent of a leaf spring, only the front walking beam can correspond to the rocker arm of the Knox structure, and it will be noted that the forward end of the walking beam is attached to the vehicle frame and hence is not free to follow movement of the axle in response to the changing contour of the roadway.

The actual mechanical operation of the FEATHER RIDE suspension is not similar to that of the Knox structure. The two devices perform the same function, in that each operates to distribute the load carried by the vehicle to the tandem axles. However, due to differences in construction and arrangement of parts, as for example the fact that the FEATHER RIDE structure employs the rigid rear walking beam and trunnion-supported nests of coil springs in place of the simple leaf spring 3 of the Knox structure, and the further fact that in the Knox structure the rocker arm is pivoted midway of its length, whereas in the FEATHER RIDE suspension the front walking beam is pivoted at its forward

end, there is a difference in mode of operation to which defendant's witness Mackie testified (Tr. 143).

*Interchangeability of parts.*

To interchange the front walking beam of the FEATHER RIDE suspension with the rocker arm of the Knox six wheel attachment would result in an inoperable structure. The front walking beam of the FEATHER RIDE suspension is pivotally connected at its forward end to the vehicle frame, whereas in the Knox patent the rocker arm 8 must be mounted for pivotal movement about a pin midway of its length. Because of this difference in structure, if the front walking beam of the FEATHER RIDE suspension were to be substituted for the rocker arm of the Knox structure, the interconnected ends of the walking beam and the leaf spring would move in the same direction, and the frame of the vehicle would drop down until stopped by the axles of the vehicle (Tr. 144). It would require a complete reorganization of the parts to substitute the front walking beam of the FEATHER RIDE suspension for the rocker arm 8 in the Knox six wheel attachment (Tr. 145).

*Defendant's activities fall within the scope of the prior art.*

Certain of the patents which are before this court as exhibits disclose structures which are in all respects similar to the FEATHER RIDE suspension. One of these is the patent to Pratt 878,156, and a comparison of Figure 2 of the patent drawings with the lowermost

illustration on Exhibit 75 will disclose this similarity. Pratt provides side levers 9 to which the rear axle 13 is secured by means of a universal joint. A leaf spring 8 is mounted on each lever 9. [Mr. Knox testified (Tr. 95) that the coil spring of the FEATHER RIDE suspension is the equivalent of a leaf spring.] The forward end of the lever 9 in the Pratt structure is connected to the foremost of the rear axles by means of a shackle consisting of interlocking clevises engaging with the axle and the forward end of the side levers 9, respectively. The reach 25 functions as a radius rod and "serves to hold the axle 17 against a tendency to rotate in conjunction with the axle 20". The side levers 9 of the Pratt structure are, for all intents and purposes, equivalents of the rear walking beams of the FEATHER RIDE structure. One of the interlocking clevises is equivalent to the shackle links which interconnect the walking beams in the FEATHER RIDE suspension. The other of the interlocking clevises forms a rocker arm, pivoted at one end, and carrying universal swivel means for securing the axle to the clevis.

An even closer approximation of the FEATHER RIDE suspension is illustrated in Figure 1 of the British patent to Spencer 8262 of 1906. If comparison is made with the lowermost illustration on Exhibit 75, it will be discovered that each element of the FEATHER RIDE suspension is duplicated by an equivalent element in the British structure. In each of the two illustrations the right hand end of the frame is broken away to indicate that the forward end of the frame is toward the right hand edge of the sheet. In each structure the forward



end of a solid front walking beam is pivotally secured to the vehicle frame. The foremost of the rear axles is mounted midway of the length of the walking beam, and in each instance the means of attachment of the axle to the walking beam is such that a universal swivel connection is achieved. The rearward end of the front walking beam is connected to the forward end of a rear walking beam by means of a flexible connection. In the **FEATHER RIDE** suspension the connection between the front and rear walking beams is by means of shackle pins mounted in rubber. In the British structure the connection takes the form of a pivoted hanging bolt  $q$  on which a spring  $d$  is threaded which supports the free end of the rear walking beam. In the **FEATHER RIDE** suspension the rear walking beam is a solid beam and is pivoted intermediate its length by means of the trunnion on which is mounted the spring rider. In the British structure the rear walking beam is in the form of a laminated spring which is pivoted intermediate its length on pin  $n$ . The universal swivel connection between the rear axle and the rear walking beam in the British structure is similar to the connection between the foremost axle and the front walking beam. In the **FEATHER RIDE** suspension each of the axles is connected to the respective walking beams by the T-casting and rubber filled housing hereinbefore described. Defendant's witness Mackie testified that the mode of operation of the British suspension and the mode of operation of the **FEATHER RIDE** suspension is substantially the same (Tr. 147).

Should the court be persuaded that the testimony of

plaintiff's witness Knox was correct when he stated that the front walking beam of the **FEATHER RIDE** suspension is a spring, then and in that event appellant invites attention to the structure illustrated and described in the patent to Mohl 1,534,458. The front walking beam of the **FEATHER RIDE** is pivotally connected at its forward end to the vehicle frame, and is connected at its rearward end to a rear walking beam. The foremost of the rear axles is mounted midway the length of the front walking beam. In the Mohl structure, the spring *a* is pivotally connected to the vehicle frame at *b* and is flexibly connected to the rear walking beam at *c*. The foremost of the rear axles *m* is mounted midway of the length of the spring. [Plaintiff's witness Knox testified that a leaf spring is the equivalent of a universal joint (Tr. 112-113 and 127).]

In both the Mohl structure and the **FEATHER RIDE** suspension the rear walking beam is in the form of a rigid beam, and in each instance the beam is pivoted intermediate its ends with the rear axle mounted on the free end of the beam.

Should the court find it to be true that a leaf spring and a beam are equivalent structures, and that in the **FEATHER RIDE** suspension the front walking beam is the equivalent of the spring 3 in the Knox structure (Tr. 101); and should the court likewise find it to be true that a leaf spring is the equivalent of a universal joint, then it is respectfully submitted that in the Mohl patent is to be found a disclosure of the combination of elements or their equivalents employed in the

FEATHER RIDE suspension. It follows as a matter of law, therefore, that if the FEATHER RIDE suspension infringes the claims of the Knox patent in suit, then by the same token the patent to Mohl 1,534,458 is a complete anticipation of the structure defined by those claims.

## POINTS AND AUTHORITIES ON ASSIGNMENT OF ERRORS GROUP IV

In order to constitute persons joint inventors it is not necessary that exactly the same idea should have occurred to each at the same time, and that they should work out together the embodiment of that idea in a perfected machine.

48 C.J. 120, Sec. 134.

*McKinnon Chain Co. v. American Chain Co.*,  
(C.C.A. 3) 268 Fed. 353.

*Ross & Co. v. Wigder*, (C.C.A. 3) 290 Fed. 788.

*Shreckhise v. Ritchie, et al.*, (D.C.W.D. Vir.) 67  
F.S. 926.

*Quincy Mining Co. v. Krause*, (C.C.A. 6) 151  
Fed. 1012.

*Thropp Sons Co. v. DeLaski & Thropp Circular  
Woven Tire Co.*, (C.C.A. 3) 226 Fed. 941.

*Welsbach Light Co. v. Cosmopolitan Incandes-  
cent Light Co.*, (C.C.A. 7) 104 Fed. 83.

*Arnold v. Bishop*, 1 F.C. 1165.

*Bannerman v. Sanford*, 99 F. 294.

*American Patent Diamond Dop Co. v. Wood*, 189  
F. 391.

In the case of a joint invention, the patent should be obtained by the joint inventors, and a patent granted to one of joint inventors as the sole inventor, is void.

*City of Milwaukee v. Activated Sludge*, 69 F. (2d) 577, 587, C.C.A. 7 (1934), cert. den. 293 U.S. 576, 79 L. Ed. 673.

*Tin Decorating Co. v. Metal Package Corp.*, 37 F. (2d) 5, 7, C.C.A. 2 (1930), cert. den. 281 U.S. 759, 74 L. Ed. 1168.

*Larson v. Crowther*, 26 F. (2d) 780, 789, C.C.A. 8 (1928), cert. den. 278 U.S. 648, 73 L. Ed. 560.

*George v. Perkins*, 1 F. (2d) 978, 979, C.C.A. 8 (1924).

*Joseph Ross & Co. v. Wigder*, 290 Fed. 788, 789, C.C.A. 3 (1923).

*McKinnon Chain Co. v. American Chain Co.*, 268 Fed. 353, 360, C.C.A. 3 (1920).

*Smart v. Wright*, 227 Fed. 84, 87, C.C.A. 8 (1915).

*Newgold v. American Electrical, etc., Co.*, 108 Fed. 957, 959 (1901), aff'd 113 Fed. 877, C.C.A. 2 (1902).

## ARGUMENT

Plaintiff's witness Knox testified that in January, 1925, Harry Y. Stebbins came to the Utility Trailer Manufacturing Company, of which Knox was then chief engineer, with a six wheel attachment for motor vehicles in all respects similar to the structure illustrated in Figure 1 of the Knox patent in suit, except that in place of the universal joint on the end of the rocker arm shown in Figure 1 there was a pin and bushing hinge connection.

The following testimony was elicited at the time of taking of proof on behalf of the party Knox in the matter of *Garner L. Knox v. Albert H. Fager*, Interference No. 55,383, upon direct examination of Garner L. Knox (Exhibit No. 5):

"Q. 11 Tell, as fully as possible, the circumstances leading up to your conception and development of this invention.

A. Our company was manufacturing a six wheel attachment for Mr. H. Y. Stebbins.

Q. 12 What company do you refer to?

A. The Utility Trailer Manufacturing Company.

A. (Q. 13) We commenced the manufacture early in February, 1925.

A. (Q. 14) This Stebbins attachment did not provide for universal action between the rocker arm and the six wheel axle. \* \* \* We continued manufacturing the Stebbins attachment for him without any universal and without this hinge point immediately above the axle, but did make a number of sketches showing various universal constructions.

Q. 24 Did you discuss the matter of the need of this universal attachment with Harry Y. Stebbins at this time?

A. Yes. I discussed with him the need of more flexibility in his attachment.

Q. 25 When did this discussion take place?

A. During February and March, 1925.

Q. 31 Can you describe the construction of the universal shown in any one of these sketches?

A. We have one tracing that is based on one of these sketches, which was never manufactured. It showed a rocker arm, in one end of which was journaled a horizontal shaft, this shaft having a hole at right angles to its length in the end of it.

Q. 36 When was it that you disclosed your idea of the use of a universal to Mr. H. C. Bennett, Mr. Clune and Mr. Stebbins?

A. On or before March 1, 1925.

Q. 38 Do you recall any particular discussion had with any one of these parties concerning this matter?

A. Yes; they all agreed that some universal action would be an improvement, but did not want to hold up manufacture of the attachments then in production.

Q. 48 Was Mr. Clune employed by the Utility Trailer Manufacturing Company?

A. No; he was a salesman for H. Y. Stebbins.

Q. 131 Are you now able to produce the drawing to which you referred earlier in your testimony as being an earlier drawing than Knox exhibits B, C and D, and which you said you would produce in response to Q. 35?

A. (to Q. 132) I submit drawing dated May 19, 1925, as being a tracing made from one of the early sketches previously referred to.

Q. 133 Who made this tracing?

A. The draftsman employed by Stebbins.

Q. 134 From what was the tracing made?

A. From one of these early sketches.

Q. 135 Who made the early sketches?

A. This particular sketch was made by Mr. Clune.

Q. 139 Did you give to Mr. Clune instructions and the idea of the construction as shown in this tracing?

A. No; I did not. This was his idea of a universal that could be incorporated in the six wheel attachments he then had in production."

In answer to defendant's suggestion that the structure claimed in the Knox patent is rightly the joint invention of Stebbins and Knox, plaintiff argued that Stebbins did not desire the substitution proposed by Knox; that Stebbins considered the substitution harmful and that the substitution would unduly complicate the structure. Such argument is, of course, untenable, for



it is universally recognized that in inventions involving combinations of elements the conceptions of use of the various elements need not and surely most frequently do not spring from the thoughts of one person. Nor, in the case of joint invention, is it necessary or even conceivable that such conceptions should come simultaneously in the minds of the parties. In *Quincy Mining Co. v. Krause*, 151 F. 1012, the Circuit Court of Appeals, Sixth Circuit, remarked:

“It is next said that the evidence tends to show that this idea of placing the outlet inside of the mortar was the thought of but one of the patentees, and therefore could not be the subject of a joint patent. If a claim covered but a single idea, it would be difficult to conceive how it could be patented by two, but, when a claim covers a series of steps or a number of elements in a combination, the invention may well be joint, though some of the steps or some of the elements may have come as a thought of but one.”

In *Thropp & Sons Co. v. DeLaski & Thropp Circular Woven Tire Co.*, 226 F. 941, it was established that Thropp designed a major part of the device and that DeLaski designed a small but important part thereof. In holding the invention to be joint, the Circuit Court of Appeals, Third Circuit, stated:

“The claims of the patent which are in litigation are not for the elements of the machine but are all directed to the machine as a whole.

“In a machine containing as many elements as this one, it is not to be thought nor by the law required, that the inventive conceptions of two inventions shall develop simultaneously. One may conceive a general or imperfect outline of an entirely

novel thing, which, without the conception of another developing it and giving it body, might never amount to invention; but if the conceptions of one supplement and complement the conceptions of the other, the result might be invention and therefore joint invention.

“We are entirely satisfied that while Thropp first conceived the idea of wrapping a tire under pressure, his idea was in part developed by DeLaski, and that DeLaski’s ideas and contributions were so essential and were so related to the conception of Thropp that, without them, Thropp alone would not have produced the invention for which the patent was issued.”

An analogous situation is presented in the instant case by putting Stebbins in the shoes of Thropp and Knox in the shoes of DeLaski. Stebbins, like Thropp, conceived the general plan of the invention but Knox’s ideas and contributions were so related to the conception of Stebbins that, without them, Stebbins alone would not have produced the invention for which the patent was issued.

Plaintiff argues that Stebbins objected to the substitution of the universal joint for his simple link, and therefore cannot be considered as joint inventor with Knox. It is not understood that merely objecting to the substitution of one element for another for any reason was sufficient ground for Knox to appropriate to himself the entire combination, most of which was the sole conception of Stebbins. The Courts clearly observe that the various elements going to make up the combination may well be the result of independent thoughts of more than one person, and they do not require that

all parties must concur therein. It is readily conceivable that the basic conceptions of one party might be further developed by another without the direct knowledge of the former, and yet it could not justly be said that they did not collaborate in the development thereof. If such were the law, a person could secretly develop the basic invention of another and thereby confiscate the entire product.

Stebbins' objection to the substitution made by Knox merely indicates a difference of opinion as to the merits of the substitution. According to Knox, Stebbins erroneously believed the substitution would produce unsatisfactory operation. But it is unconscionable that a person should be penalized to the extent of losing his basic invention for such an error in judgment. Had Stebbins not been one skilled in the art, he might not have objected to the substitution. But the Courts hold that the conceptions of unskilled persons may be developed by a skilled party and a patent issued to them jointly. Thus, it is irrelevant whether Stebbins was skilled but held an erroneous opinion or was unskilled and had no opinion. Knox improved Stebbins' basic conception.

In *Ross & Co. v. Wigder*, 290 F. 788, Moffat conceived the idea of plating finger nail files with tin to improve the quality. Knowing nothing about electroplating, he commissioned King, an expert on plating, to do the work. Ordinary tin plating was unsuccessful, but plastic tin plating proved satisfactory. Moffat had no knowledge whatever of plastic tin plating, but the Circuit Court of Appeals, Third Circuit, held that Moffat and King were joint inventors of the novel file.

Thus, it is immaterial whether one of joint inventors is skilled or unskilled, and it is unnecessary to account for Stebbins' erroneous conclusion as to the merits of the substitution of the universal joint. Knox considered the substitution to be appropriate and his contention proved accurate. However, he would not have had the opportunity of perfecting Stebbins' device had not Stebbins consulted him in the first place.

In *Arnold v. Bishop*, 1 F.C. 1165, Bishop and McLean conceived of the idea of crossing wool diagonally. Their employer authorized Bishop to have Arnold make the machine. Arnold devised a machine having the vibratory and rotary motion necessary to produce the diagonal crossing of the wool, and then declared he was entitled to a patent as sole inventor of the device. Chief Justice Crane of the Circuit Court for the District of Columbia declared:

"The man who reduces to practice the theory of another who assists in the reduction of it to practice cannot be considered as the sole inventor of the machine. Arnold would not have made the machine unless informed by Bishop of the discovery he had made of the effect of the diagonal crossing of the wool. The invention consists both of the discovery of the principle and the reduction of it to practice. Neither Bishop nor Arnold, therefore, could be considered as sole inventor."

In *Bannerman v. Sanford*, 99 F. 294, the Circuit Court of Appeals, Second Circuit, observed:

"Roper, having with Spencer, invented and constructed a machine which contains a certain useful combination, thereafter takes out a patent in his own name covering this very combination. If the

prior machine produced by both men, and known to both, does not disentitle Roper to cover such combination in his patent, it would not disentitle Spencer to cover the same combination in a patent to himself; and we would have two joint inventors, each rightfully holding a separate patent for the same invention, which is absurd."

Similarly, Stebbins and Knox both contributed to the development of the structure ultimately patented by Knox. Thus, if this finished device, produced by the efforts of both Stebbins and Knox and known to both, does not disentitle Knox to patent it, it would not disentitle Stebbins to patent it. As the Court reflected, we would then have two joint inventors, each rightfully holding a separate patent for the same invention, which is absurd.

In *American Patent Diamond Dop Co. v. Wood*, 189 F. 391, the Circuit Court, E.D. New York, held valid a patent issued jointly to father and son as inventors of a diamond dop, although the son testified that the bifurcated finger was the sole conception of the father. The Court stated:

"This testimony (while it may show that greater credit belonged to the father as to certain parts of the structure, or that the father might have worked out the bifurcated finger himself) does not go so far as to indicate that the patent should be held invalid because one feature of it, even though it be an important feature, was thought by one of the two who worked out the entire invention, for otherwise it would be impossible to hold that two individuals could jointly participate in inventing a structure, as it must necessarily happen that some of the concepts representing various steps in the



invention should occur to first one and then the other, and yet the invention, as a whole, be the joint product of the two."

In *McKinnon Chain Co. v. American Chain Co.*, 268 F. 353, Hoff conceived of the idea of welding chain electrically. He talked with Coulter about the plan and requested Coulter to manufacture it. Hoff had the idea of forming the chain links about two mandrels by the simultaneous and successive movement of arms about the mandrels. The device made by Coulter embodied the arm movement of Hoff but contained only one mandrel. The patent which issued to Coulter was declared invalid by the Circuit Court of Appeals, Third Circuit, as follows:

"Not having lost sight of the fact that the patent is for a combination, we can conceive that if Hoff's simultaneous and successive arm movements had been a part of the prior art, Coulter might have taken them, and, adapting them to a single mandrel, might have made in that combination a new invention. There invention would have resided solely in the combination, in no degree in its elements, and Hoff might not be heard to complain. But Hoff's conception, which he gave Coulter to develop mechanically, was not then a part of the art, either prior or present. The machine then contained in combination Hoff's conception and what we have assumed was Coulter's conception, so combined and interrelated that the presence of each was indispensable to the functioning of the other, for without either the machine would not work.

"As both Hoff and Coulter had at one time—the crucial time—worked together for a common end, which was finally accomplished by the contributions and united efforts of both, we are of opinion, after applying familiar laws to the facts, that the



invention was the invention of both, and was, therefore, joint invention. (References cited.)

"On this finding it follows that the award of the patent to Coulter as the sole inventor was unlawful, and that, in consequence, the patent, as to the claims in suit, is invalid."

Nor can plaintiff justify the procurement of Letters Patent to Knox by showing that Stebbins acquiesced in the knowledge of Knox's efforts to obtain a patent in his own name. This was the situation in the case of *Shreckhise v. Ritchie, et al.*, 67 F.S. 926, and the District Court, W.D. Virginia, held the patent void, stating that even if the other joint inventors knew of Shreckhise's efforts to obtain a patent in his own name and acquiesced therein,

"\* \* \* it could not serve to make valid in Shreckhise's hands a patent which was void from the beginning."

Another similarity in the instant case and that of *Shreckhise v. Ritchie, et al.*, is in the fact that when the patentees applied for Letters Patent, the Patent Office knew nothing of the joint nature of the venture, but had to rely upon the oaths of the individual patentees. In the cited case, the Court stated:

"It is true that the issuance of a patent carries a prima facie presumption of its validity. But the force of this presumption is weakened when the ground upon which validity is assailed was not in issue before the patent office and never known or considered there. In the instant case the patent issued to Shreckhise on his representation that he was the sole inventor. Had the true facts been disclosed at the patent office I have no doubt the application would have been rejected."

The above discussed cases present situations substantially the same as those presented in Mr. Knox's testimony in the instant case, and the Courts' decisions in these cases have been unanimous in finding joint invention where a device had been perfected through the efforts of two or more parties. In the present case, Stebbins provided an entire structure which, though somewhat deficient in practical operation, provided Knox with the basis upon which he was able to devise means for obtaining improved operation thereof. Accordingly, if the rulings and reasonings of the Courts as discussed hereinabove are to be recognized, it is plain that if, in fact, the substitution of a universal joint for the simple link connection of the Stebbins structure involves invention, the ultimate product of the combination as claimed is truly the joint invention of Stebbins and Knox. Appellant herein submits that since the patent in suit was issued to Knox as sole inventor of the device jointly developed by both Stebbins and Knox, the patent is invalid.

## POINTS AND AUTHORITIES ON ASSIGNMENT OF ERRORS GROUP V

Amendment to conform to proof may be made at any time, even after decision.

Rule 15 (b) Federal Rules of Civil Procedure.

*American Land Co. v. City of Keene*, 41 F. (2d) 484 (C.C.A. 1).

*Gulf Smokeless Coal Co. v. Sutton, Steele & Steele*, 35 F. (2d) 433 (C.C.A. 4).

## ARGUMENT

Garner L. Knox testified repeatedly that the structure invented by Harry Y. Stebbins was as illustrated in Figure 1 of the Knox patent in suit, except that the structure shown in the Knox patent includes a modified form of universal joint incorporated in the structure at the place where Stebbins had provided a simple hinge pin and bushing. Mr. Knox testified further that he discussed with Mr. Stebbins the matter of more flexibility in the Stebbins attachment, and that Mr. Stebbins, among others, agreed that some universal action would be an improvement (Ex. 5, p. 6). Further testimony of Mr. Knox in this connection is to be found on pages 71-72 of the record of Interference No. 55,383 (Exhibit 5) where Mr. Knox testified:

"Mr. Stebbins had brought us his idea of a six wheel attachment and made arrangements with us to manufacture them for him. As he had no drawings of this rocker arm type, he showed me by sketches what and how he wanted it built so that I could give the necessary orders to our shop to have these parts made. As I knew what equipment we had, I worked with him to the extent of making suggestions regarding practically all of the details of these parts so that they could be manufactured by us without undue cost. The discussions with Mr. Bennett and with Mr. Klune developed naturally through our mutual interest in getting a satisfactory device and likewise an inexpensive one on the market." (p. 71)

At the trial of the instant cause, Mr. Knox testified:

"Q. Are each of the elements named in the claims of the Knox patent, for example hanger brackets secured to the frame, rocker arm pivotally sup-

ported by the brackets, means for securing one end of the arms to one end of the spring supporting the rear end of the frame, an axle, universal means for securing the axle at the opposite sides of the frame to the rocker arms and wheels journaled on the axle,—are each of these elements necessary and material to the successful operation of this device?

A. Yes.

Q. Then, Mr. Stebbins having brought to you what he conceived to be his invention and you adding thereto a single element which you believed to be your invention, combining the entire structure in the claims of your patent, why did you execute an oath saying that you were the sole inventor?

A. I am not aware that in an invention you have to invent everything that is involved in the claims.  
\* \* \*

Q. Nevertheless, you employed that particular arrangement of elements in exactly that relationship in your structure, and wrote claims covering that particular arrangement of elements in addition to your universal joint, isn't that true?

A. Yes, the claims claimed in mine involve the elements of the Stebbins as well as the Van Leuven patent, plus the universal." (Tr. 117-118)

Thereupon, defendant's counsel made application to the District Court to amend defendant's pleadings to include as a separate, alternative defense that the Knox patent in suit is invalid for the reason that the application for patent was executed by Garner L. Knox as the sole inventor, whereas it is clearly evident that the invention was the joint invention of Garner L. Knox and Harry Y. Stebbins.

The court deferred ruling on the motion until the end of the case. Thereafter, on June 14, 1948, the Dis-

strict Judge made findings of fact and conclusions of law reading in part as follows:

“FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

22.

“That claims 1, 2, 11, 15 and 17 of the Knox patent in suit, No. 1,926,727, define an invention made by Garner L. Knox which overcame the problem existing in this art.

“CONCLUSIONS OF LAW

2.

“That Letters Patent No. 1,926,727 in suit is good and valid in law, particularly as to claims 1, 2, 11, 15 and 17 thereof, and that said patent and claims cover a new and meritorious invention.”  
(Tr. 24)

Defendant's motion was, in effect, to amend his Answer to conform to the evidence. Cross examination of plaintiff's witness Knox had developed the fact that the structure disclosed in the Knox patent in suit, minus the universal joint, was considered to be an invention by Stebbins, and for which Stebbins had filed application for United States Letters Patent. Mr. Knox had contributed to that structure a modified form of universal joint which he believed to be necessary, taking the entire Stebbins structure and improving a single element thereof by making of it a universal joint to prevent the wear which had been taking place between a hinge pin and its bushing.

The issue as to whether Garner L. Knox was a sole inventor or a joint inventor with Harry Y. Stebbins was

tried with the express or implied consent of the plaintiff, since the evidence was not objected to at the trial on the ground that it was not within the issues made by the pleadings. Rule 15 (b) provides that:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.”

The Court of Appeals is respectfully urged to consider the amendment as having been made. Rule 15 (b) further provides as follows:

“Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.”

In *Gulf Smokeless Coal Co., et al. v. Sutton, Steele & Steele, et al.*, (C.C.A. 4) 35 F. (2d) 433, 3 U.S.P.Q. 82, it was held that the plaintiff obtained leave to amend in the trial court to state grounds for relief against a party added by court order, but he did not amend. It was held that he could amend in the appellate court to conform to proof, or the appellate court could consider the amendment as made. Circuit Judge Parker said:

“The pleadings seem not to have been actually amended in accordance with the order, but no inconvenience was caused to the Company as the result of this neglect nor has it been taken by surprise in any way.”

In the instant case evidence that Garner L. Knox was a joint inventor with Harry Y. Stebbins was de-



veloped on cross examination of plaintiff's witness on matters first brought out by plaintiff's counsel on direct examination. The plaintiff could not have been taken by surprise, since it supplied the evidence upon which defendant bases his motion to amend his pleadings. Appellant avers that the District Court erred in not ruling on defendant's motion to amend; but since "failure so to amend does not affect the result of the trial of these issues", it is requested that the Court of Appeals consider the amendment as having been made.

## POINTS AND AUTHORITIES ON ASSIGNMENT OF ERRORS GROUP VI

The selection and putting together of the most desirable parts of different machines in the same art, where each separate part is selected solely to perform the obvious purpose for which it was used in the prior art, is not invention, but rather the evolution of the mechanical ability of one skilled in that particular art.

*Adams v. The Galion Iron Works & Mfg. Co.*,  
(C.C.A. 6) 42 F. (2d) 395; 6 U.S.P.Q. 69.

*Atlas Trailers & Water Mufflers, Inc. v. Gray's  
Iron Works, Inc., et al.*, 43 F. (2d) 191; 6  
U.S.P.Q. 276. Aff'd 54 F. (2d) 1075; 12 U.S.  
P.Q. 354.

*The Fisher Governor Co., Inc. v. C. F. Camp Co.*,  
(C.C.A. 10) 40 F. (2d) 341; 5 U.S.P.Q. 393.

*National Hollow Brake Beam Co. v. Interchange-  
able Brake Beam Co.*, (C.C.A. 8) 106 F. 693.

*The T. F. Rowley Co. v. Albert T. Rowley*, 39 F.  
(2d) 865; 5 U.S.P.Q. 212.

*R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc.*, (C.C.A. 9) 151 F. (2d) 432; 67 U.S.P.Q. 165.

*Brill v. Washington Railway Co.*, 215 U.S. 527; 54 L. Ed. 311; 30 S. Ct. 177.

*Hazeltine Research, Inc. v. General Motors Corp.*, (D.C.E. Mich.) 72 F.S. 138, 74 U.S.P.Q. 85.

## ARGUMENT

Garner L. Knox, on the occasion when the Stebbins structure was originally presented to him, suggested incorporating in the Stebbins structure a universal joint where the end of the rocker arm connected with the yoke 15, although, according to the testimony of Mr. Knox, Mr. Stebbins objected to such modification.

"A. As soon as the first one was built, which, incidentally, was not built to our drawings, Stebbins came out and personally directed our mechanic how he wanted it. As soon as the structure was put together, we saw the stiffness in there and tried to get him to put a universal in, but he was opposed to complicating it; thought it was not necessary.

THE COURT: You thought it was necessary at all times?

A. Yes." (Tr. 77)

The language of Judge Walter H. Sanborn in *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, supra, seems to be especially appropriate in the instant case. Judge Sanborn said:

"There are some mechanical devices so obvious and appropriate for the performance of their accustomed functions that the common knowledge and experience of those unskilled in mechanics, to say nothing

of those learned in the art, at once suggests their use when the results which they customarily attain are desired."

In the same case, the same able jurist, speaking of the use of a wedge in a new combination, held:

"Neither the intuition of the inventor, nor the skill of the mechanic is required to suggest the fitness of a wedge to take up slack, to prevent lost motion in, or to tighten the loose members of, a mechanical device. Its fitness for these purposes is common knowledge, and has been taught by the common experience of mankind."

And in speaking of the use of retaining lugs in a patentable combination, Judge Sanborn said:

"There can be neither discovery nor invention in applying a remedy so plain to, or in combining a contrivance so obvious with, an old mechanical device which needs it."

There is no more invention in the combination of a universal joint in any of its usual forms, discharging its customary function of permitting a shaft to have oscillatory movement, with Stebbins six wheel attachment than there is in the discovery of the universal joint itself and its common use for a multitude of purposes. If this were not true, every combination of an old device with a universal joint, performing its well known and expected function, would constitute an invention.

The principle of law thus stated was applied by Circuit Judge Hicks in *The T. F. Rowley Co. v. Albert T. Rowley*, 39 F. (2d) 865; 5 U.S.P.Q. 212, where the court said:

"The ball bearings introduced by J. F. Rowley and located in races upon the outer surface of the shaft (patent No. 1,090,881) reduced the area of the surfaces brought into contact with each other and converted sliding friction into rolling friction and thus in a large measure eliminated the squeak. But ball bearings are old. They are in general use, and it is commonly understood that they reduce friction and the attendant noises and it is obvious that their use here arose out of nothing more than the thought of a mechanic. It was not invention. It was simply the adaptation of an old device to the same use in a different structure. \* \* \* They accomplish no other purpose in Rowley's ankle joint than they would accomplish in any other relationship."

In *The Fisher Governor Co., Inc. v. C. F. Camp Co.*, (C.C.A. 10), *supra*, plaintiff substituted ball bearings for plain bearings on the float in a gas and oil separator tank to reduce friction and overcome sticking of the shaft. Plaintiff conceded that the float without the ball bearings was in use long before the patent was applied for; and, further, that the use of ball bearings to resist radial and end thrust was old in the arts. It contended that there was patentable invention in discovering the difficulty and remedying it; and patentable invention in adapting ball bearings to a float mechanism. Circuit Judge McDermott delivered the opinion of the court:

"Ball bearings are old; their use is public property; their peculiar function is to reduce friction. In our opinion, one cannot avail himself of this ancient principle in a new device, and appropriate the idea to his exclusive use. At best, it involves no more than mechanical ingenuity to substitute ball bearings on a shaft which sticks in a plain bearing."

In *R. G. LeTourneau, Inc. v. Gar Wood Industries, Inc.*, (C.C.A. 9) 151 F. (2d) 432, 67 U.S.P.Q. 165, the Circuit Court of Appeals for the Ninth Circuit affirmed the principle of law that using an old device for an old result is not invention. Circuit Judge Stevens said:

“Was LeTourneau’s adaptation of a cable system to accomplish the results achieved in his scraper a matter of invention? LeTourneau connected a cable to a load moving device. With one cable he moved two different loads, and by allowing for their varying weights, he moved them in sequential order. Such results had been accomplished before by means of cable systems. Therefore, LeTourneau merely utilized an old device for an old result, namely, the moving of loads in sequential order. Such a combination does not involve the exercise of inventive genius.

“As the Supreme Court explained in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 90: ‘We may concede that the functions performed by Mead’s combination were new and useful. But that does not necessarily make the device patentable. Under the statutes (35 USC Sec. 31; R.S. Sec. 4886) the device must not only be “new and useful”, it must also be an “invention” or “discovery” \* \* \*. Since *Hotchkiss v. Greenwood*, 11 How. 248, 267, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be involved than the work of a mechanic skilled in the art.’ ”

The decision of the Supreme Court of the United States in *Brill v. Washington Railway Co.*, 215 U.S. 527; 54 L. Ed. 311; 30 S. Ct. 177, appears to be particularly appropos in the instant case. Mr. Justice Holmes rendered the opinion of the court:

“We are not dealing with a new type of trucks, but with certain features only. \* \* \* In that claim the only possible element of novelty is the mode in which the semi-elliptic springs are suspended from the side frames. In practice the links are elastic and the pins on which the whole combination hangs have a universal ball and socket movement, although the claim only says ‘movably and resiliently suspended \* \* \* substantially as described.’ \* \* \* We agree, however, with the Circuit Court of Appeals, that the substitution of a ball and socket movement for the movement in one direction of the Thyng link, coupled, as it was with a slight longitudinal play, required a minimum of invention. A link having universal movement was patented by Beach in 1876. The plaintiff’s witness Akarman says that there always has been provision made for lateral and longitudinal motion in every well constructed truck.”

Every element disclosed in the Knox patent 1,926,727 and recited in the claims in suit is provided by the Stebbins six wheel attachment and the prior art. A good mechanic having the Stebbins structure and being confronted with the problem of providing more flexibility between the rocker arm and the axle of the attachment, and having the benefit of such prior art patents as Smith 1,111,924, Collard 1,131,118, Laisne 1,316,369, and McCracken 1,527,987, could have done the thing which Garner L. Knox did without any invention whatever, just as Knox did it. We quote from the decision in *Hazeltine Research, Inc. v. General Motors Corp.*, (D.C.E. Mich.) 72 F.S. 138, 74 U.S.P.Q. 85, wherein District Judge Lederle said:

“Where, as here, it appears that a patentee has merely accomplished an old result by a combination of



means which, singly or in similar combination, were disclosed by the prior art, and the patentee has made no advance over the prior art beyond that which would be accomplished by a mechanic skilled in the art, there is no patentable invention, 35 U.S. C.A. 31; *Detrola Radio etc. Corp. v. Hazeltine Corp.*, 313 U.S. 259; *Cleveland Punch & Shear Works v. Bliss Co.*, 145 F. (2d) 991."

## CONCLUSION

We submit that plaintiff's patent is invalid for lack of novelty or invention, and that the trial court was in error in sustaining the patent. The scope of the claims in suit is delimited by the form and structure disclosed in the specification and drawings, and since defendant does not use that form or structure he does not infringe. The District Court erred in giving plaintiff any relief.

We submit that Garner L. Knox, the patentee of Letters Patent No. 1,926,727, invented nothing. Application for United States Letters Patent for the six wheel attachment had been filed by Harry Y. Stebbins. Harry Y. Stebbins and his assignee, Utility Trailer Manufacturing Company, conceded priority of invention to David L. Van Leuven. The Harry Y. Stebbins structure is covered by the claims of Letters Patent No. 1,655,481, to Van Leuven. Each of the structures of Stebbins and Van Leuven was prior in time to the date of alleged conception of invention by Garner L. Knox. Knox's only contribution to the device disclosed, described and claimed in his patent was the substitution of a modified form of universal joint for the simple hinge pin and

bushing employed by Stebbins for securing the rocker arm to the axle of the attachment.

All of the elements disclosed in the Knox patent in suit were already in combination and already well known, singly or in groups, as common expedients in similar situations, and the substitution of any one of the several well known forms of universal joints for the simple hinge pin and bushing in the Stebbins structure can hardly be said to justify the patent. The combination of the Stebbins structure and the particular form of universal joint selected by Knox did not produce some new result going beyond that which may have been achieved by mere mechanical skill in operating the elements disclosed by the prior art.

We submit that the improvement of any part or element of an old combination gives no right to claim that improvement in combination with other old parts or elements which perform no new function in the combination. It is clear that the Knox "invention" was not the *combination* of elements defined by his claims, but rather the improvement of a single element of a prior art structure by reason of his substitution therefor of a universal joint. It is submitted that Garner L. Knox was not the inventor of the combination claimed, and that the patent is void as claiming more than the patentee invented.

We submit that if, by any stretch of imagination, plaintiff is entitled to any range of equivalents sufficient to bring defendant's structure within the scope of the claims in suit, then by the same token the patent

to Pratt 878,156, the British patent to Spencer 8262 of 1906, or the patent to Mohl 1,534,458, completely anticipate the structure defined by claims which read on defendant's FEATHER RIDE suspension.

We submit that the testimony of Garner L. Knox establishes beyond a reasonable doubt that he and Harry Y. Stebbins were joint inventors of the subject matter disclosed, described and claimed in the Knox patent in suit; and the fact that Harry Y. Stebbins had agreed that some universal action would be an improvement, but did not want to hold up manufacture of attachments then in production, did not give Knox the right to apply for a patent as the sole inventor. Since the patent in suit was issued to Knox as sole inventor of a device jointly developed by Harry Y. Stebbins and Garner L. Knox, the patent is invalid.

Finally, we submit that in view of the state of the art, and analogous arts, and in view of what was common knowledge on the part of those skilled in the art, and analogous arts, at the time of and long prior to the alleged invention or discovery made by the said Garner L. Knox, the subject matter and disclosure of the patent in suit did not involve patentable discovery or invention, and involved nothing more than the exercise of mere mechanical skill.

We ask the Court's indulgence for the length of this brief. Invention and patentability are largely questions of fact. To make them clear, involving, as it does, problems of mechanics and physics, is not easy, as it is difficult to make clear by written word that which ob-

jectively is obvious, and this has compelled us to extend the length of this brief so that a manifest injustice may be corrected.

The decree should be reversed and defendant absolved from liability.

Respectfully submitted,

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No. 12146

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

R. W. POINTER, doing business under the fictitious name  
and style of POINTER-WILLAMETTE Co.,

*Appellant,*

*vs.*

SIX WHEEL CORPORATION, a Corporation,

*Appellee.*

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BRIEF OF SIX WHEEL CORPORATION,  
APPELLEE.

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No. 12146

IN THE

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FOR THE NINTH CIRCUIT

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R. W. POINTER, doing business under the fictitious name  
and style of POINTER-WILLAMETTE Co.,

*Appellant,*

*vs.*

SIX WHEEL CORPORATION, a Corporation,

*Appellee.*

---

## BRIEF OF SIX WHEEL CORPORATION, APPELLEE.

---

Appellant, R. W. Pointer, has appealed from the judgment of the District Court adjudging valid and infringed Claims 1, 2, 11, 15 and 17 of the Garner L. Knox Patent No. 1,926,727.

The structure found to infringe these claims is the Feather Ride structure manufactured by R. W. Pointer, dba Pointer-Willamette Co. The Feather Ride structure is illustrated by Exhibit 3-A and the model, Exhibit 69.

### Jurisdiction.

The District Court had jurisdiction under the Patent Laws (Judicial Code 24, 28 U. S. C. A. 41 (7)). This Court has jurisdiction of this appeal (Judicial Code 129, 28 U. S. C. A. 227). The appeal was timely.

### Statement of the Case.

The Knox patent relates to an invention in a six wheel attachment or running gear for a vehicle. The invention is described by Mr. Knox in the patent in suit (p. 1, col. 1, lines 1-8):

“This invention relates to six wheel attachments for motor vehicles, and is more particularly directed to a six wheel attachment for trucks, buses and the like, for distributing the load carried by the motor vehicle to the added wheels, to remove from the rear wheels of such a motor vehicle a portion of the load customarily carried thereby.”

The Knox patent in suit is of unusual commercial importance to the transportation art. The Knox patent solved a problem long existent in the art [Finding of Fact 8, R. 20] and the invention of this patent has been in use by the assignees of the Knox patent and its licensees since 1925 [Finding of Facts 13, 14, R. 22]. The patent before its grant was the subject of extensive interference contest before the Patent Office, which was vigorously fought [Exhibits 7, 8 and 9].

It was conclusively shown to the District Court that the art and patents prior to Knox's invention not only failed to teach a solution of the problem stated in the Knox patent, but that such prior art discloses structures which are impractical and inoperative [Finding of Fact 20, R. 23].

While defendant-appellant in its Statement of Points on appeal 5 [R. 53] set forth this finding as one of the points it intended to rely upon, it has, on its appeal,



abandoned this point. In its Statement of Points, appellant stated in Point 5 that the Court erred in its Finding 20, but in its brief, appellant has excluded this finding from its "Specifications of Error" (Pltf. Br. pp. 14-16) and does not now urge that the District Court erred in entering this finding. By its abandonment of this specification of error defendant-appellant admits the correctness of this finding.

The art relied upon is entirely in the form of prior patents (Pltf. Br. pp. 2, 3). This patent art, which is admittedly impractical and inoperative and which fails to disclose a solution of the problem solved by the patentee, Knox, can neither anticipate nor limit the Knox patent. It is fundamental that a successful invention is not to be defeated by earlier failures. (*Carnes Artificial Limb Co. v. Dilworth Arm Co.*, 273 Fed. 838 at 841; *Crown Cork & Seal Co. v. Ideal Stopper Co., et al.*, 123 Fed. 666 at 668; *Kirchberger et al. v. American Acetylene Burner Co.*, 124 Fed. 764 at 776, 777; *Walker on Patents*, Deller's Ed., Vol. 1, Sec. 48, p. 257; *Morey v. Lockwood*, 8 Wall. 230.)

The invention made by Knox as described in the patent in suit and defined by the claims thereof is for the first successful practical six wheel running gear for a vehicle. The problem which Knox solved was to provide a running gear where there are four rear wheels in two pairs, one pair trailing the other, and which wheels are so interconnected that the load carried by the body of the truck is proportioned to each of the four wheels in the desired

ratio. The Knox invention is defined by the Court in Finding 7 [R. 19, 20].

In the operation of such a six wheel running gear unit there are two major considerations which must be met; they are:

(1) To so interconnect the wheels of the leading and trailing pairs that each wheel under all conditions of operation supports its proportion of the load. This is particularly important when the six wheel vehicle passes over irregularities of the surface of the roadway, such as through depressions or over bumps. In this operation in accordance with the Knox invention the wheels are permitted either to move away from one another, or toward one another, depending upon which is required by the condition of the roadway.

(2) The wheels must be maintained so that they "track." Knox provided for flexibility of operation of the four wheels at the rear of the vehicle and at the same time so connected the axles together that the wheels may revolve freely and in the direction of travel of the vehicle and will therefore "track."

Mr. Knox solved these problems by the interpositioning of a universal joint between the rocker arm and the added axle of the tandem axle assembly which permits freedom of movement of the second axle so that when required it may even assume a position of irregularity or angle to the driven axle. The universal joints provided between the rocker arm and this added axle are such as to prevent the interpositioning of a strain upon this added axle which

would otherwise cause hanging up of one or more of the wheels of the six wheel running gear. The result is that under all conditions each wheel supports its proportion of the load. This problem and its solution is defined by the Court in Findings 7 and 8 [R. 19, 20].

Prior workers in the art had sought a solution of this problem but had considered it necessary either to provide (1) means for steering the added wheels, or (2) a rigid connection between the axles.

A solution of the problems of this art was thought to reside in making the wheels dirigible (steering) so that they can be turned when the vehicle turned. This attempt proved a failure [R. 79]. An illustration of this failure is found in the "Maxi" unit of Stebbins and Van Leuven [R. 82]. A further attempted solution of this problem was to rigidly couple the two axles together. These rigid structures also proved to be failures. An illustration of this type is found in the "Simplex" structures of Stebbins [R. 81].

In studying this problem, Mr. Knox soon came to the conclusion that added flexibility was required and suggested to Mr. Stebbins the invention of the Knox patent [R. 71]. Mr. Stebbins, because of the experience that he had had with the steering structures ("Maxi" units) which he had previously made, opposed Knox's solution of the problem [R. 81]. Mr. Stebbins designed a rigid structure which he then requested Utility Trailer Mfg. Co. to build. He stated that to introduce an additional joint in the structure would result in unsatisfactory operation [R. 81,

82]. Stebbins based his conclusion in this regard upon the experience which he had had with the steering type of structure [R. 71-74].

Proceeding then upon the insistence of Stebbins, a number of rigid type structures were built. After a few months of operation these structures failed [R. 76].

The rigid structures built according to Stebbins' directions had the wheels closely coupled and, being rigid, it was possible to raise one wheel only a few inches from the ground before the other wheel would likewise leave the ground [R. 76]. The result was the imposition of a great strain upon the structure and there was *no* equal load distribution [R. 76].

Mr. Van Leuven, patentee of Letters Patent No. 1,655,481 [Exhibit 56], was at that time working with Stebbins. Stebbins and Van Leuven are the joint patentees of the "Maxi" structure of Patent No. 1,562,265. Van Leuven also maintained that to put a universal attachment between the rocker arm and the added axle of the structure would produce an inoperative structure [R. 84, 85]. When the rigid type structures failed, Stebbins was unwilling to accept Knox's solution of the problem but constructed another form of attachment in which hydraulic cylinders were employed and which were connected to the end of the truck spring and to the attachment axle. When one of these structures was built, it proved so impractical that it could not even be road-tested [R. 86].

Stebbins then abandoned all effort to solve the problems in this art and an arrangement was made with Utility

Trailer Mfg. Co. under which Utility Trailer took over all of Stebbins' activities and a license arrangement made between Utility Trailer Mfg. Co. and Stebbins. Utility Trailer Mfg. Co. then revised all of the structures it had made for Stebbins, supplanting the rigid structure with the universal type structure which Knox had invented. Utility Trailer Mfg. Co. corrected these installations at its own cost because the trade was holding that company responsible for the unsatisfactory operation of the rigid attachments [R. 90].

While Utility Trailer Mfg. Co. was engaged in the manufacture and sale of the Knox structure, a patent was granted March 15, 1927, to Albert H. Fager, No. 1,620,809. At that time the Knox application for the patent in suit was on file in the United States Patent Office. An Interference No. 55,383 was declared between the then pending Knox application and the Letters Patent granted to Fager. This interference was vigorously contested by the parties.

Defendant, at the trial of this cause of action, stated that he would rely upon Fager as being the prior inventor, but when proof was offered by plaintiff of Knox's prior invention in accord with the proofs which had been made to the United States Patent Office, counsel for defendant stipulated that Garner L. Knox was the prior inventor [R. 132].

Following the conclusion of the interference, plaintiff corporation was formed. Licenses have been granted by it to all of the principal companies engaged in the manu-



facture and sale of six wheel running gears. A similar license was offered to this defendant and refused [R. 159-160]. The companies licensed are:

Cook Bros.	Plaintiff's Exhibit	13
Fruehauf Trailer Co.	" "	14
Weber Trailer & Mfg. Co.	" "	15
Pike Auto & Trailer Works	" "	16
The Trailer Company of America	" "	17
Six Wheels, Inc.	" "	18
Doane Motor Truck Co.	" "	19

Following the conclusion of the interference in the Patent Office with the Albert H. Fager Patent No. 1,620,809, suit was instituted against Fager Manufacturing Co. in the United States District Court for the Southern District of California and resulted in the granting of the injunction [Exhibit 77].

Defendant has admitted receipt of notice in writing of infringement prior to the filing of this suit [R. 62], has admitted the corporate existence of plaintiff corporation [R. 63], and that title to the Letters Patent in suit resides in plaintiff corporation.

Defendant sought during the trial to amend its answer to allege that the invention of the Knox patent in suit was not in fact the sole invention of Garner L. Knox but was the joint invention of Knox and Stebbins [R. 17]. This motion was denied. Motion for a new trial was made by defendant, based upon asserted newly discovered evidence [R. 29] dealing with the assertion that the invention of the Knox patent was a joint rather than the sole invention of Garner L. Knox. This motion was also denied [R. 46].



## Questions Involved on This Appeal.

The questions raised by defendant, R. W. Pointer, by this appeal are grouped by defendant-appellant in its brief (pp. 14-16) and are to the effect that:

(1) The Court erred in finding the Garner L. Knox patent valid as to claims 1, 2, 11, 15 and 17 (Group I), and conversely, that the Court erred in not finding claims 1, 2, 11, 15 and 17 of the Knox patent to be invalid and void (Group I and Group II).

(2) The Court erred in holding that the defendant's structure as exemplified by Exhibits 3-A and 69 infringed claims 1, 2, 11, 15 and 17 of the Knox patent (Group III).

(3) The Court erred in holding that the alleged invention of the Knox patent was the sole invention of Garner L. Knox and in failing to find that the invention of the Knox patent was the joint invention of Garner L. Knox and Harry Y. Stebbins (Groups IV and V).

(4) The Court erred in not finding that the subject matter of claims 1, 2, 11, 15 and 17 involved nothing more than the exercise of mechanical skill (Group VI).

(5) The Court erred in adopting the conclusion of law that plaintiff was entitled to an injunction and accounting with reasonable attorney's fees and in issuing a permanent writ of injunction.

The appeal taken was from the determination by the District Court of the questions of novelty, invention and infringement. Each of these determinations thus made is a question of fact. These findings are supported by substantial evidence and should not be disturbed. (*Refrigeration Engineering, Inc. v. York Corp.*, 168 F. 2d 896 (C. C. A. 9).)

### Summary of Argument.

The District Court found as a matter of fact the Garner L. Knox patent involved invention. The question of invention is one of fact, and this finding is in accord with the overwhelming weight of evidence. The Knox patent meets the test for invention laid down by the courts in that it discloses and claims the first solution of the problem of obtaining equal load distribution of the four rear wheels of a six wheel running gear of a vehicle. The Knox invention succeeded where all prior attempts had failed. The solution may appear simple, view retrospectively, but it is in simple solutions of complex problems where real invention is found.

The District Court properly concluded that the Knox invention was novel, useful and not anticipated by anything existing in the prior art. This decision of the District Court was greatly fortified by the District Court's finding that the devices of the prior art are either impractical or inoperative and fail to teach a solution of the problem. This finding of this District Court is not challenged [Finding of Fact 5].

The Knox invention is not negated by the prior art patents which, as the District Court found, failed to disclose the solution of the problem dealt with by Knox.

Defendant's expert, Dr. Clark, when required to pick from the 39 patents cited by defendant in his answer, selected a group of these patents which he believed to be the most pertinent and with respect to each of the patents so selected as "the best" of the prior art, stated not only that he had never seen a structure such as exemplified by the patents so selected, but that they would be impractical and that he certainly would not want to own such a structure [R. 252, 254].

The defendant-appellant's Feather Ride structure is a clear infringement of the Knox patent. The structure of the Feather Ride includes the Knox invention; the parts utilized in the Feather Ride construction are the mechanical equivalents of the structure shown in the Knox patent. This is established from the direct examination of defendant-appellant's production manager, Alden W. Mackie [R. 141, 142, 148].

Not only is the Feather Ride structurally identical with that shown in the Knox patent, but there is no difference in the mode of operation of the structures [R. 141].

The claim made by defendant-appellant that the invention of the Knox patent is not the sole invention of Garner L. Knox, but is in fact the joint invention of Knox and Stebbins, finds no support whatsoever in the record. On the contrary, it is shown that Stebbins would not permit the utilization of the Knox invention in the structures which Stebbins had had made for him by Utility Trailer Mfg. Co. [R. 81]. Stebbins abandoned the project when his structures failed [R. 86]. Knox carried on and made these structures operate successfully [R. 89, 90].

The Court did not err in its finding of fact that the invention made was the sole invention of Garner L. Knox. The District Court did not err in concluding that plaintiff-appellee was entitled to an injunction and accounting with costs and attorneys' fees and in issuing a permanent writ of injunction. The District Court having concluded as a matter of fact that the Knox patent discloses invention and that the defendant in its Feather Ride structure had infringed claims 1, 2, 11, 15 and 17 of this patent, correctly granted to plaintiff-appellee the relief prayed for and in allowing plaintiff-appellee its costs and "reasonable attorney's fees to be determined by the court" did not err. (*Refrigeration Engineering, Inc. v. York Corp.*, 168 F. 2d 896 at 901.)

### Argument.

There is no error in the District Court's finding that the Knox patent discloses invention. The District Court in its Finding of Fact 7 [R. 19] determined the fact of, and defined the invention of, the Knox patent in suit and in its finding of fact, specifically defined the problem which had existed in this art prior to the Knox invention and which problem Knox solved. Appellant attacks these findings first on the ground that the invention is anticipated by the prior art, and secondly upon the ground that the invention of the Knox patent is an obvious mechanical expedient.

The question of whether an improvement requires mere mechanical skill or the exercise of faculty of invention is one of fact. (*Thomson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 445, at 446, and *York Corp. v. Refrigeration Engineering, Inc.*, 168 F. 2d 896 at 899.)

This finding of the District Court is in accordance with the overwhelming weight of evidence. The Knox patent meets all the tests laid down by the Court for determining all tests of invention as distinguished from the mere skill of the art.

The closest approach to the Knox invention in the prior art is found in the German Patent No. 209,994 and the British Patent No. 18,943 of 1907. Dr. Clark, defendant-appellant's expert, testified [R. 247-249]:

"Q. I take it there is none of them that you consider shows exactly what is shown in Fig. 1 of the Knox Patent in Suit? A. No, there is none that

I know of that corresponds in detail to that shown in the Knox Patent.

Q. In structure, function and mode of operation?

A. Yes, each one of the Patents which I have recited to some degree and to some purpose fairly well—

Q. Just tell me which ones fairly well show it?

Mr. Cook: If your Honor please, if counsel for the plaintiff would specify in his question 'structure, mode of operation,' and so forth, I think it would help the witness and help us get better evidence.

Mr. Lyon: He just said some of them were the best. Let us see him pick them out.

A. Well, I think that German Patent is one example, in fact, is a pretty good example, one of the better ones, if not the best.

Q. All right. A. British Patent 18,943, 1906, is pretty fair.

Q. Any others? A. You know I can't—I am trying to do my best. I picked out two. You want the best. How can there be more than one best?

Q. Are those the best, then? A. No, they are not the best, but they are among the best.

Q. They are among the best and there is no better?

Mr. Cook: I should like to ask if the witness is referring to the mode of operation or structure or function.

Mr. Lyon: I believe I am competent to conduct this examination.

Q. I ask you if there are any better in your opinion than the German and British Patents which you have referred to? A. I don't know, without further study."

The German patent referred to is Patent No. 209,994 [Exhibit 66]. This German patent selected by defendant's expert, Dr. Clark, as the most pertinent reference relied upon by defendant-appellant was not included in the designation of the record here on appeal. Defendant in its answer and before the District Court relied upon 39 prior United States and foreign patents, as well as pleading the defense of prior invention by Fager, Patent No. 1,620,809 [R. 9]. The defendant proceeded upon the theory that 39 patents added strength to its defense. As stated in *Ball & Roller Bearing Co. v. F. C. Sanford Mfg. Co.*, 297 Fed. 163 at 167:

"\* \* \* It seems necessary to apply to patent litigation from time to time the maxim that one can not make omelettes of bad eggs,—no matter how many are used. One good reference is better than 50 poor ones, and the 50 do not make the one any better."

See also:

*Forsyth v. Garlock*, 142 Fed. 461 (C. C. A. 1);

*Draper Co. v. American Loom Co.*, 161 Fed. 728 (C. C. A. 1);

*Scott v. Fisher Knitting Machine Co.*, 145 Fed. 915 (C. C. A. 2).

The other patent selected by Dr. Clark, British Patent No. 18,943 (1907) [Exhibit 60], before the District Court,



was also excluded from the designation of the record to be relied upon by appellant on this appeal. Appellant has thereby abandoned the position of its own expert before the District Court with respect to these prior patents. In fact, defendant-appellant in its designation of the record here on appeal would like to be relieved from all of the testimony of its expert, Dr. Clark, having excluded from its designation substantially all of the testimony given by Dr. Clark before the District Court. Dr. Clark's testimony is now before this Court by the counter-designation of appellee.

Appellant does not now rely upon these patents chosen by its expert to be the best of the 39 patents pleaded as now being pertinent. The reason for this is obvious. Dr. Clark testified that the structures as disclosed in the prior German and British patents were inoperative and impracticable. Dr. Clark was required to admit wide structural differences from the German patent to the Knox patent in suit on cross-examination [R. 249, 251] and testified [R. 252]:

“Q. Did you ever see a structure as shown in this German patent? A. No.

Q. In fact, it would be very impracticable, wouldn't it, as an engineer? A. Well, I would not care to own a vehicle like that.”

The same is true with respect to the British Patent No. 18,943 [Exhibit 60], and the structural differences between this British patent and the Knox patent in suit as well

as the differences in mode of operation were admitted by Dr. Clark on cross-examination [R. 253, 254]:

“Q. Did you ever see a structure made like this?

A. No.

Q. Would you ever want to see a structure made like this? A. I would not.

Q. It would not be practical, would it? A. No, I doubt whether it would work out to be practical.”

With the “BEST” of the art as thus selected by defendant’s expert, Dr. Clark, as being inoperative and impracticable, it is evident that the decision of the District Court that the Knox patent is valid and does disclose invention is amply supported by the evidence. A prior patent which merely discloses an impractical device and which is shown to have had no effect on the art does not negative the novelty of the invention of a later patent which has successfully solved the problems of the art. In *Carnes Artificial Limb Co. v. Dilworth Arm Co.*, 273 Fed. 838, at 841, the court said:

“From this, as well as from other testimony respecting the patents of the prior art, and an examination of the patents themselves, the conclusion is that the prior art patents were either inoperative or impractical for the purposes intended. Respecting such a finding the Circuit Court of Appeals for the Fourth Circuit, in *Farmers’ Mfg. Co. v. Spruks Mfg. Co.*, 127 Fed. 691, 62 C. C. A. 447, said:

“‘It cannot be said that a patent for a device, which fails to accomplish the desired end, is an anticipation of one which successfully accomplishes it.’”

In the recent case of *Shotey v. Apex Broach Co.*, 83 Fed. Supp. 807, the District Court for the Eastern District of Michigan, Southern Division, had adopted the rule

as stated by the Court of Appeals for the Tenth Circuit in *Williams Iron Works v. Hughes Tool Co.*, 109 F. 2d 500, 510 (C. C. A. 10) :

“A prior patent which fails to solve the problem toward which the inventor’s efforts are directed does not anticipate a subsequent patent which successfully solves the problem and effectually accomplishes the desired result.”

This principle was applied by the Supreme Court in the case of *Morey v. Lockwood*, 75 U. S. 230 at 242, 8 Wall. 339 at 342, and is illustrated from this case of the Supreme Court in Deller’s Edition, Walker on Patents, Vol. I, Sec. 48, at page 257, wherein the Supreme Court has analyzed :

“\* \* \* the prior Mau syringe was set up to negative the novelty of the syringe of Dr. Davidson and his brother. The latter is the wellknown soft rubber bulb apparatus. The former was exactly like it, except that the central part was a soft rubber cylinder with metallic heads, instead of a soft rubber bulb. The theoretical mode of operation of the two syringes was the same. But the Mau apparatus proved to be of no practical value, and very few specimens of it were ever sold; because the metallic heads of the cylinder strongly counteracted the user’s efforts to compress its rubber walls. For these reasons, the Supreme Court held that it did not negative the novelty of the Davidson patent.”

See also :

*Crown Cork & Seal Co. v. Ideal Stopper Co., et al.*,  
123 Fed. 666 at 668, and

*Kirchberger, et al. v. American Acetylene Burner Co.*, 124 Fed. 764 at 776, 777.

# The Prior Patent Art—Designated by Appellant on This Appeal.

Of the art which defendant relied upon in the District Court, appellant has now selected (Plaintiff's Brief 3) the following patents:

Jeffries	174,533	Defendant's Exhibit	30
Richards	177,156	"	31
Pratt	878,156	"	32
Brillie	915,733	"	35
Warner	924,862	"	36
Smith	1,111,924	"	38
Collard	1,131,118	"	39
Pichoud	1,147,439	"	40
Pflager	1,276,687	"	44
Laisne	1,316,369	"	45
Naeser	1,414,147	"	47
Furlong	1,436,031	"	48
McCracken, <i>et al.</i>	1,527,987	"	50
Mohl	1,534,458	"	51
Stebbins, <i>et al.</i>	1,562,265	"	52
Van Leuven	1,655,481	"	56
Fageol	1,692,891	"	58
Spencer (Br.)	8,262 of 1906		59

Dr. Clark, defendant's expert, selected no one of these patents as the most pertinent of the 39 before him.

These patents were selected in total disregard of the position of defendant before the District Court, and apparently account for the desire of appellant to exclude from the record on appeal the cross-examination of its expert, Dr. Clark.

Having before the District Court 39 patents, appellant is now taking a "scatter-shot" at the Knox patent by aban-

doning in its entirety the evidence before the District Court. It has been long recognized by this Court that a party would be bound by the testimony of his expert witness in selecting from a multiplicity of prior patents those which he considered to be the most pertinent.

Appellant having thus abandoned its position before the District Court, there is now no evidence before this Court as to the manner in which these patents now selected are to be construed with relation to the Knox patent in suit.

In a further effort to correctly correlate the 39 prior patents pleaded by the appellant in his answer, plaintiff at the trial of this cause of action grouped the patents into well recognized classes. The group thus made of the prior art patents was into the following classes:

(a) The railroad bogie art.

(b) The four wheel vehicle art.

(c) The "Maxi" type structure having a spring for each axle and where the springs are connected by a lever.

(d) Structures in which there is a lever connected at one end with a spring and at the other directly to the other axle of the tandem axle construction.

This classification was presented to defendant's expert, Dr. Clark, and patents were classified in this manner [R. 226-233]. Plaintiff's expert, W. A. Doble, agreed to the classification of the art as thus made [R. 268-276]. This method of classifying a multiplicity of prior art patents was accepted by this Court in the case of *Killefer Manufacturing Co. v. Dinuba Associates*, 67 F. 2d 362 at 366. Plaintiff will consider these prior patents in accordance with the classification thus made by the experts testifying in this action:

(a) The Railroad Bogie Art:

In this art there is included the following patents in accordance with the classification made by W. A. Doble [R. 268]:

Jeffries	Defendant's Exhibit	30
British Patent 8,262	"	" 59
Fageol	"	" 58

as well as some of the other patents now excluded from this record by appellant's designation.

The railroad bogie art deals with an entirely different form of structure from that set forth in the Knox patent in suit or defined by the claims thereof. The principal characteristic of this art is that it deals with types of structures used in railway trains and the efforts to utilize that same type of running gear or wheel suspension for road vehicles. The characteristics of this art are as set forth by plaintiff's expert, W. A. Doble, with particular reference to the Jeffries patent, Exhibit 30, selected as an example.

There is first no similarity of the problem dealt with in the bogie art to that dealt with by Knox [R. 269]. In this structure there are two or three or more pairs of wheels which are supported in bearing blocks D [Jeffries patent, Exhibit 30] so that the wheels may have vertical movement only. The structures are intended to ride upon railroad tracks or relatively smooth surfaces and the wheels are confined to movement up and down. There is no possibility in the structures of one wheel or axle assuming a position at an angle to another or getting out of line or failing to "track." The very nature of the structure of a railroad bogie car truck is that the wheels are to run



along a rail, the wheels are provided with flanges to maintain the wheels running parallel. They cannot turn and there is no problem of load distribution between the wheels in passing over bumps or through depressions in a roadway of sufficient magnitude that would permit one wheel to "hang up" and thereby cause the imposition of its proportion of the load to the other wheels of the assembly. In these structures there is really no equivalent to the rocker arm 8 (Fig. 1) or 30a (Figs. 6 and 7) of the six wheel running gear of the Knox patent. Plaintiff's expert, Mr. Doble, testified [R. 269, 270]:

"Q. Is there any similarity of any disclosure of the solution of the problem of the six-wheel art to be found in this bogie art? A. No, there is not. It is a different art and it has different problems. It is not confronted with the problem which was presented to Mr. Knox in solving the six-wheel truck axle suspension mechanism.

Q. In this bogie art, is there any direct connection between a bar which could be classified as a rocker arm and one of the axles of that assembly? A. Well, no, not in the sense of the Knox Patent. In Fig. 3 there is a member 'G' which carries a helical spring which might be considered as a rocker arm, that is directly connected to the axle journal box.

Q. No universal joint in that connection, is there? A. No, there is not.

Q. The other end of that member 'G' is connected with the member 'H', which, in turn, is pivoted at its center point to the intermediate axle of that structure, is it not? A. That is correct.

Q. That member 'H' in that structure is not carried by the beam, is it? A. No, it is not."

The British patent to Spencer, No. 8,262 [Exhibit 59, R. 560], is addressed to "Improvements in Bogies for Railway Vehicles and the like." In this structure we have the same characteristic as found in the patent to Jeffries in that the wheels which are intended to ride upon the railroad track are supported in bearing blocks *m* so that their movement is limited to a vertical plane. In this structure means are provided for distributing the load between the wheels, whether it be the four wheel form of bogie truck of Fig. 1 or the six wheel structure of Fig. 4. In each of these cases there is provided an element which is engaged with the upper surface of the axle bearing block *m* substantially midway between the length of that lever and there is provided a means for dampening the reaction to the movement of the bearing block and hence the axle in this structure. In the structure of Fig. 1, a spring *a* is connected with a spring clevis at each end and the spring clevis is in turn connected with a weighing rod *h* and this weighing rod is in turn mounted on the upper apex of the bearing block *m* and is in turn connected with a coil spring *e*. At the other end of the structure and in the intermediate set of wheels as illustrated in Fig. 4, the lever *h* is again connected with large coil springs *g* acting to maintain the link *h* yieldably in contact with, or at the apex of, the sliding bearing block *m*. There is no problem dealt with in this patent of misalignment of the wheels or is there present the problem of the danger of the wheels hanging up so that the load intended to be transmitted to each of the wheels may at some time be transmitted to another wheel or wheels of the assembly. The structure is not required to operate on surfaces containing bumps or depressions. These patents in the bogie art in no case

illustrate a rocker arm which is connected with an axle through the medium of a universal joint.

The Fageol Patent No. 1,692,891 [Exhibit 58], is for a structure where an effort was made to utilize the railroad bogie type of structure in a road vehicle in which the two axles are directly connected with the ends of a lever 9 and this lever in turn is supported at its center on a pivot or cross-axle 3. Also supported on this cross-axle 3 is a bracket 23 which is secured to the central portion of a leaf spring 24. This is a rigid type structure in which the two axles must directly follow each other and they are at all times maintained in definite spaced relationship determined by the length of the lever 9 interpositioned between the two axles. This Fageol patent indicates one of the many attempts to utilize the railroad bogie art suspension in a road vehicle. This patent did not result in a solution of the problem facing Knox. There is no evidence in the record that the structure was ever employed. It does not meet the claims of the Knox patent in any way and does not disclose a structure employing a rocker arm which is pivotally secured to a bracket secured to the frame of the vehicle and which rocker arm is in turn secured at one end to one axle by a universal joint and at the other end is secured to a beam or spring. There is no beam or spring like the spring 3 of the Knox patent which is secured intermediate its end to an axle like the axle 2. The beam or spring 3 is in turn connected in the Knox patent with the end of the rocker arm 8 at one end and at its opposite end is secured to the frame of the vehicle. This Fageol patent does not show an intermediate linkage or beam or spring member between its walking beam 9 and either of the axles of the assembly as required

by the claims of the Knox patent in suit. The patent was solicited by the Fageol Company, which at one time manufactured railway cars as well as automobiles, in an effort to translate from the railway art to the automobile art the bogie type of construction and which did not prove successful [R. 270].

There is an entirely different organization of parts attempted to operate through a different mode of operation, the mode of operation being the same as that given to the railroad bogie type of suspension.

Defendant's expert, Dr. Clark, did not consider this patent close enough to the disclosure of the Knox patent in suit to even mention it during his cross-examination where he was interrogated with reference to what he considered to be the closest to the patent in suit.

The patent to Pratt, No. 878,156 [Exhibit 32], could be properly classified in this bogie art in that like the Fageol patent it shows a walking beam 9 which is pivotally mounted upon a cross-axle 10 and at this point it is secured to the center portion of a leaf spring 8. The two axles are secured to the opposed ends of the walking beam 9 so that they must follow the movement of the beam 9 directly. The Pratt patent in addition to this clear differentiation from the Knox patent in suit, shows that the wheels 20 or intermediate wheels between the driven wheels and the forward wheels of the vehicle are made dirigible, *i. e.*, steering. Further in order to hold this intermediate axle in definite position with relation to the frame and with reference to the forward axle, Pratt connects reach rods 26 between the forward axle 3 and the intermediate axle 17. With this rigid type of structure thus provided

he further provides for raising the intermediate wheels 20 completely off the ground, utilizing a rope and winch assembly for this purpose. Like the Fageol patent [Exhibit 58], this patent relates to a structure of an entirely different type, operating through a different mode of operation. The Pratt patent does not disclose the combination of the Knox patent in suit wherein a rocker arm is connected at one end with a beam or a spring and at its opposite end is connected through the medium of a universal joint with an added axle. There is no evidence in the record that this patent had any effect on the art or that any structure like it was ever built or used.

A further illustration of the bogie art is the patent to Pflager, No. 1,276,687 [Exhibit 44], which patent is for "Car Truck" and in which the bearing housings for the axles are constrained so as to have only vertical movement, a factor common to all the patents in this art and in which the axle housings are secured to the center of elliptical springs. These elliptical springs are in turn connected with walking beams 21. As there can be no freedom of movement of the wheels of this truck out of the strictly vertical plane in which they are maintained, it is apparent that this structure could not operate over a surface having the bumps and depressions over which a road vehicle is required to operate. The problem, therefore, confronting Knox was not that dealt with by Pflager. There is no similarity of structure, function, mode of operation or problem.

The clear distinction in mode of operation of the structure of the Knox patent is what characterized the Knox invention. The flexibility of Knox due to the universal joints between the ends of the rocker arm and the added



axles permits the wheels carried by this axle to “find” their required position of operation; in so doing the wheels maintain equal load distribution.

In *Winans v. Denmead*, 15 How. 341, the Supreme Court held:

“Its substance is a new mode of operation, by means of which a new result is obtained. It is this new mode of operation which gives it the character of an invention, and entitles the inventor to a patent; and this new mode of operation is, in view of the patent law, the thing entitled to protection.”

#### **(b) The Four Wheel Vehicle Art:**

In this art we are dealing with the conventional type of vehicle having two front wheels supported by an axle and two rear wheels supported by an axle common to the ordinary pleasure motor vehicle of present day construction. In the early days of passenger automobile construction, the two axles were commonly supported to the frame of the motor vehicle by individual elliptical springs of the same character as now commonly employed in many motor vehicles. The development of steel had not proceeded to the point of its present day perfection for such use so that it was not uncommon, because of the very bad roads over which pleasure automobiles traveled in early days, to break such a spring. This weakness of the pleasure vehicle received a great deal of attention and many forms of spring suspension were suggested in order to overcome this steel weakness [R. 272].

This problem was ultimately solved, not by the use of any of these different spring suspensions as suggested by these patents in this art, but by the actual improvements



in the quality of the steel used. These problems, however, do not deal with the problem of the Knox patent. They are not concerned with the distribution of the load of a heavily laden vehicle over six wheels in order to reduce the load concentration upon the highway. They are not concerned with the equal distribution of this load so that equal distribution is maintained at all times in order that the load may be properly transported over the highway. The problem dealt with by these patentees is entirely foreign to that which concerned the workers in the art of the Knox patent. In the classification of the patents now set forth in appellant's brief are properly classified patents to

Richards	177,156	Defendant's	Exhibit	31
Warner	924,862	"	"	36
Smith	1,111,924	"	"	38
Collard	1,131,118	"	"	39
Pichoud	1,147,439	"	"	40
Laisne	1,316,369	"	"	45
Naiser	1,414,147	"	"	47
McCracken, <i>et al.</i>	1,527,987	"	"	50

In this art the same may be divided into two subdivisions, one being where the two axles are separately and independently secured to the frame and which would then include the patents to

Richards	Defendant's	Exhibit	31
Smith	"	"	38
Collard	"	"	39
Laisne	"	"	45
McCracken, <i>et al.</i>	"	"	50

In the second subdivision are included the patents to

Warner	Defendant's Exhibit	36
Pichoud	" "	40
Naeser	" "	47

In the distinction between these two subdivisions of the four wheel vehicle art it is found that the first subdivision shows no attempt whatsoever to distribute the load to four wheels as through the use of a system in any way similar to that of the Knox patent in suit, but each axle is independently suspended from the frame through some form of spring arrangement intended as a substitute for the multiple leaf elliptical spring then commonly used on such vehicles.

In the second subdivision of this four wheel vehicle art, a suggestion was made to connect the front and rear axles together through some form of connecting mechanism so that the force encountered for example by the front wheels of a vehicle in passing over a bump or depression found a corresponding action or reaction in the rear wheels. This subdivision is correctly related to "the Toonerville trolley" because the result is that the vehicle would "hop" down the road much in the manner of a rabbit because the imposition of the force on one set of wheels of a four wheel vehicle would be opposed through the lever arrangement by the rear wheels and the result is inevitably a rocking motion or hopping of the vehicle [R. 273]. Such structures are entirely impracticable.

It was in recognition of this fact that Dr. Clark, defendant's expert, excluded all of the patents of four wheel vehicles from the selection which he made of patents which are closest to the disclosure of the Knox patent in

suit. Dr. Clark excluded patents of this character, stating [R. 245]:

“That is out on the ground that there are no linkages between the axles.”

In these four wheel structures like that shown in the British patent where the front axle is connected with the rear axle, for example, as shown in the patents to Warner [Exhibit 36], Pichoud [Exhibit 40] and Naeser [Exhibit 47], Dr. Clark recognized the impracticability in stating [R. 259]:

“Q. Do you believe that such a structure would be practical, a practical structure for operation on the highway, where you connect the front and rear wheels together so that the force transmitted to the front wheels or, rear wheels, would be at the same time transmitted to the other pair of wheels? A. Well, on a four-wheel vehicle, no.”

In the patents of the first subdivision of this class like, for example, the Richards Patent No. 177,156, each axle is independently connected to the frame by means of a pair of levers which are connected at their ends to the axle and in turn are connected with a compression spring carried in the frame of the vehicle. This patent utilizes the spring *f* in the place of a similarly mounted elliptical spring. It discloses not a motor vehicle, but a carriage, and the problem dealt with by Richards was in an effort to reduce the height of the vehicle body from the roadway. There is no problem of load distribution dealt with or mentioned and certainly Richards was not concerned with the problem of distributing the load correctly between four wheels of a rear truck or vehicle assembly so that this load distribution might be maintained at all times

irrespective of the condition of the roadway over which the vehicle was traveling. Nothing different is found in the Warner Patent 924,862. This patent is for a four wheel vehicle; there is no four wheel tandem axle arrangement and no flexible structure is provided. There is no universal joint between a rocker arm and an added axle.

“A device which does not operate on the same principle cannot be an anticipation.” (*Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, 284 (C. C. A. 9).)

The other patents of the first subdivision of this art, namely, the patents to

Smith	Exhibit 38
Collard	“ 39
Laisne	“ 45
McCracken, <i>et al.</i>	“ 50

are entirely comparable with the patent to Richards as far as their pertinency to the patent in suit is concerned. There is no load distribution attempted by any of these patents and they all seek merely the substitution of some form of elliptical spring or spring arrangement to overcome the common failure in this art at that time of the breaking of elliptical springs. For example, the patent to Smith attempts to utilize the two telescopic parts 19 and 20 to provide a casing in which such a coil spring might be mounted and to position one such coil spring at each effective end of the lever 8 on the opposite sides of the pivot 10 by which such lever is pivoted to the vehicle frame.

The patent to Collard, in an effort to reduce the number of such springs, discloses the cross-elliptical spring

system which was commonly utilized in the T-model Ford, except that in this case Collard mounts his elliptical springs in a plane at 90° from the plane in which such springs are commonly mounted. The springs are connected through a linkage arrangement with the frame and in this type of construction the rods *f* become torque arms, the function of which is to hold the axles in definite position with relation to the frame.

In the Laisne patent there is again disclosed an effort to substitute for the elliptical spring a coil spring. No load distribution problem was dealt with in this patent and the two axles of the four wheel vehicle are independently suspended from the frame. Laisne was not in any way concerned with Knox's problem.

**(c) The "Maxi" Type Structure Having a Spring for Each Axle and Where the Springs Are Connected by a Lever:**

In this third subdivision of the prior art patents relied upon by appellant there is the common feature that for each wheel there is provided an elliptical spring. The elliptical spring is connected at approximately its central portion with an axle, one end of such spring being connected with the frame and the other end of the spring being connected with a lever, which lever is pivoted to the frame. This lever is connected at each of its ends with the free end of an elliptical spring. In this subdivision of the art of the patents now referred to by appellant in his brief are included the patents to

Brillie	915,733,	Exhibit	35
Furlong	1,436,031,	"	48
Stebbins, <i>et al.</i>	1,562,265,	"	52

These patents recognize that because of the required distance between the two axles of a six wheel vehicle oc-

casioned by the use of a separate elliptical spring for each axle and the use of a connecting lever between the adjacent free ends of such springs that it is necessary to steer or make dirigible the wheels of the added axle.

The patent to Brillie is in fact directed to a particular arrangement of such steering mechanism (Brillie patent, Fig. 4) in order to make possible the operation of this structure. This factor is recognized in the Brillie patent [Exhibit 35], page 1, lines 9-13 thereof, where Brillie states:

“The present invention has for its object an arrangement allowing of the realization of a six-wheeled motor vehicle, comprising two steering wheels at the rear as well as two in front.”

There was an effort to use this type of structure which is likewise shown in the Stebbins, *et al.* Patent No. 1,562,265 [Exhibit 52], because of its difficulties in operation of maintaining “tracking” as well as in equality in load distribution which in the end resulted in Stebbins abandoning all efforts to solve the problem of this art. Because of the necessary very long connections required to make such added rear wheels dirigible where the vehicle was loaded as such vehicles are, it was impossible to maintain the wheels tracking because these connections would freely bend when the wheels encountered an obstruction. The result was that the wheels would soon assume a position very similar to that shown for the rear wheels in Figure 4 of the Brillie patent where the vehicle was intended to progress in a straight manner down the



roadway. Such an operation was entirely unsatisfactory due to grinding away of the tires of the vehicle and the strains imposed upon the vehicle by the attempt of the rear wheels to turn the rear section of the vehicle while the front wheels were endeavoring to progress the vehicle in a straight manner.

With respect to the operation of this type of vehicle, Mr. Knox testified [R. 78] that he was shown structures of the character of the Stebbins patent by Stebbins in 1924 in Los Angeles and these structures correspond substantially with that illustrated in the Stebbins patent [Exhibit 52], and that he observed these structures in operation, stating [R. 79]:

“A. Yes, during the remainder of the year 1924, I saw a number of those in operation in the city and heard of the difficulties they were having. In several instances I saw trucks operating with the attachment wheel, going down the road with the wheels out of line, all four wheels of the truck.

Q. In what way were they out of line, Mr. Knox? Will you point out from the drawing that you have what wheels that you say were out of line.

A. The wheels designated by the letter ‘E’—and the one that I examined had a steering link 22 running from the steering mechanism of the truck’s front axle to the steering arm of the attachment wheel. That steering arm is designated 21, the steering link 22. It buckled, had a decided bow in it, with the result that the wheels ‘E’ were turned to the left when the truck wheels were headed straight ahead. I would say the angle, as I recall, was about ten degrees or more; decidedly out of line.”

The Furlong Patent No. 1,436,031 [Exhibit 48], is in all respects similar to the disclosure of the Stebbins patent and the Brillie patent in that there is a spring provided for each wheel and these springs are connected through links at their free ends, spacing the wheels of the vehicle a relatively great distance apart and necessitating the use of steering mechanism for more than the front set of wheels. In fact, Furlong has endeavored to provide an eight-wheel vehicle and to simultaneously steer six of eight wheels. Such a structure has all of the difficulties of that encountered with the Stebbins structure of Patent No. 1,562,265 amplified by the greater spacing of the dirigible wheels. No such structure was ever operated and if operated, the result would be the same as that encountered with the Stebbins structure.

This "Maxi" type of vehicle does not correspond to the claims of the Knox patent found to be infringed. There is no rocker arm which is connected with one of the axles through the imposition of a universal joint and which rocker arm is at its opposed end connected with a spring or beam carrying the other axle of the tandem axle arrangement.

The attempt to solve the load distribution problem through the use of the "Maxi" type unit was a failure and was abandoned [R. 81]. The designation of this class as the "Maxi" type is because of the name applied to this unit by Stebbins and Van Leuven when they endeavored to produce the structure of the Stebbins patent [R. 80].

(d) Structures in Which There Is a Lever Connected at One End With a Spring and at the Other Directly to the Other Axle of the Tandem Axle Construction:

In this classification there is included the patent in suit to Knox,

Knox	1,926,727, Exhibit	1
also Mohl	1,534,458, “	51
Van Leuven	1,655,481, “	56

The patent to Mohl [Exhibit 51], is for an “Under-frame for Vehicles of any Kind.” This patent shows a vehicle of driven wheels *j* which are driven by the driven axle *m*. The driven axle *m* is suspended from the frame by springs 2. The ends of these springs *a* are connected to sideframe members *d* and these frame members or levers *d* are pivotally secured to the frame *g* at pivots *n*. These levers or frame members *d* are connected together by means of cross diagonal braces or stays *p*. Mohl states with reference to this structure (patent, lines 72-75):

“These crossing diagonal stays serve to take up any forces acting in the transverse direction of the frame, whereby any torsional effects on the pins *n* will be avoided.”

The structure thus produced is the most rigid that could be provided, particularly where the crossbraced frame produced is completed by the axle *f* carrying the wheels *k*. There is no universal joint provided between the frame and the axle *f*. In fact, it would make no difference in the operation of the Mohl structure if a universal

joint was introduced between the ends of the lever  $d$  and the axle  $f$  due to the rigid frame provided where the cross stays  $p$  are utilized [R. 278]. No equal load distribution could be obtained through the utilization of the Mohl structure even if a universal joint was interposed at the point suggested. The result would be that if one wheel encountered a bump, the rigid frame would cause the opposite wheel to be raised off from the ground [R. 279]. The axles  $f$  and  $m$  would not get out of parallel because of the rigid frame structure and there could be no independent equalization of the load on the opposite sides of the vehicle shown in the Mohl patent [R. 280]. It is the very purpose of the Mohl patent to prevent the action necessary to effect such independent equalization of the load on the opposite sides of the frame [R. 280].

A structure like the Mohl patent was apparently never built [R. 256]. With such a rigid structure Mohl provides for the steering of four of the six wheels in an effort to overcome the problems of this art (Mohl patent, Fig. 2).

The Van Leuven Patent No. 1,655,481 shows again a rigid type structure. Van Leuven, like Mohl, perceived the necessity of steering the added non-driven wheels. The Van Leuven patent recognized the probability of such steering mechanism becoming distorted through wear and seeks, because of a particular arrangement of the steering mechanism, to overcome this difficulty. Thus Van Leuven states (Patent, p. 1, lines 44-50):

“Another object is to provide a steering gear for the front and auxiliary pairs of wheels that will permit of perfect alignment of one pair with the other pair, even though some of the parts of the steering gear should be bent or the joints become excessively loose through wear.”

It will be recalled that Van Leuven, a joint patentee with Stebbins of Patent No. 1,562,265, had been manufacturing the "Maxi" type structure shown in the Stebbins and Van Leuven patent [R. 80]. This structure failed in operation in that it was impossible to maintain the wheels in alignment [R. 81]. Van Leuven, like Stebbins, then sought to construct a rigid assembly eliminating as far as possible all moving joints to hold the wheels in alignment. The strain imposed upon the added wheels was such that Van Leuven in his attempted solution of the problem encountered with the structure of the Stebbins & Van Leuven Patent No. 1,562,265, closely coupled his wheels and provided a very rigid steering mechanism so that he could turn the wheels to overcome some of the torsion imposed thereon. Van Leuven endeavored to produce a steering mechanism which might be bent or distorted and through the medium of which he might still maintain a working alignment of the added wheels. This structure likewise failed to provide a solution of the problem and the assignee of the Van Leuven patent, Six Wheels, Inc., abandoned this structure [R. 88, 89].

When Knox disclosed to Van Leuven his flexible structure wherein a universal joint was interposed between the rocker arms and the added axle, Van Leuven took the same position as Stebbins, for the same reason [R. 84, 85]:

"Q. In any of the conversations that you had with Mr. Van Leuven about that time, did he have objections to the use of the universal between the rocker arm and the attachment axle? A. Yes. Van Leuven maintained that the universal would not operate, that it was an undesirable feature."

The solution which Knox made to the problem which faced this art was in direct opposition to the workers in the art. Knox made his structure flexible. The workers



in the art, because of the problems that they had encountered, sought to produce rigid nonflexible structures. Except for the perseverance of Knox when those skilled in the art condemned his suggestions, the successful solution of this problem would not have been had.

The effort by appellant to make these many prior patents anticipatory of the novelty of the Knox patent clearly fails. The plan of citing 39 patents as negating novelty in the Knox patent, and then when the "best" of these patents fails, to rely upon another set, is clearly unavailing.

The true picture of the record upon which the District Court rendered its opinion is here lacking. Appellant's effort to make it appear that Knox's solution of the problem involved merely mechanical skill obviously has failed. The Supreme Court in *Diamond Rubber Company of New York v. Consolidated Rubber Tire Company*, 220 U. S. 426, 55 L. Ed. 527 at 531, answers the appellant's contention here:

"\* \* \* Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and 'in the light of the accomplished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius.' *Perl v. Ocean Mills*, 2 Bann. & Ard. 469, Fed. Cas. No. 10,876, 11 Off. Gaz. 2. Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than



subtle conjectures of what might have been seen and yet was not. It regards a change as evidence of novelty, the acceptance and utility of change as a further evidence, even as demonstration. \* \* \*.”

As conclusively shown by the record here, the art was struggling with the problem of maintaining the wheels of such a vehicle “tracking” and in seeking a solution of this problem it had resorted to the construction of rigid assemblies seeking to overcome the shortcoming of such rigid assemblies by utilizing steering mechanisms for the added wheels.

Directly contrary to this trend of the art, Knox produced a flexible structure in which the added axle has freedom of movement and this freedom of movement is provided by the utilization of a universal joint between the added axle and the rocker arm. The flexible structure thus produced succeeded—succeeded to the point where practically all manufacturers of this type of structure have accepted licenses under the Knox patent and have for many years paid royalty thereunder. The rigid type structures have completely disappeared. No clearer proof of invention could be provided.

The Knox invention is of a new combination operating upon a different principle, *i. e.*, of flexibility, and his combination has a new and different mode of operation. Knox succeeded where the others failed. The District Court’s finding as a matter of fact that the Knox patent covers the invention is supported by the preponderance of evidence within the ruling of the Supreme Court in *Diamond Rubber Tire* case, 220 U. S. 426, and the *Eibel Process Co. v. Minnesota & Ontario Paper Bag* case, 261 U. S. 45, and within this Court’s decision in *York Corp. v. Refrigeration Engineering, Inc.*, 168 F. 2d 896.

## The Feather Ride Structure Clearly Infringes the Knox Patent.

The District Court found as Finding of Fact 9 [R. 20]:

“The structure manufactured and sold by defendant as exemplified by Plaintiff’s Exhibit 3-A and as further exemplified by the model of the defendant’s structure, Defendant’s Exhibit 69, embodies each and every element of the invention of the Letters Patent to Garner L. Knox, No. 1,926,727, and was designated by defendant as his ‘Feather Ride’ structure which, in operation, does not differ at all from the operation of the six wheel attachment disclosed in the Knox Patent No. 1,926,727 in suit and as said structure is defined in claims 1, 2, 11, 15 and 17 of said Letters Patent.”

The District Court further found as Finding of Fact 10 [R. 21]:

“In defendant’s ‘Feather Ride’ structure as exemplified by Plaintiff’s Exhibit 3-A and Defendant’s Exhibit 69, defendant uses as a universal joint rubber journaled in a journal box surrounding the added axle of the structure providing at the ends of the rocker arms; such structure of universal joints are, and were known to be prior to their adoption by defendant, the equivalent of the ball and socket universal joint illustrated in the Knox Patent No. 1,926,727 illustrated in said patent as being provided between the added axle and the ends of the rocker arms.”

The District Court further found as Finding of Fact 11 [R. 21]:

“Defendant in his Feather Ride structure employs coil springs positioned between a frame bracket and the beam supporting one of the axles of its structure, which coil springs positioned at each side of the frame

provide the only spring suspension means for the four wheels from the frame of the vehicle, and that the coil springs and beams thus provided are the full equivalent, both structurally and from a manner of their operation and as they co-operate in the combination thus formed, of the laminated leaf springs as set forth in the Knox Patent No. 1,926,727 and designated in the drawings of said patent by the numeral 3.”

The District Court further found as Finding of Fact 12 [R. 21-22] that the Feather Ride structure includes each and all of the elements of the Knox patent in suit and that these elements co-operate in the same way to produce the same results and have the same mode of operation as the elements disclosed in the Knox patent in suit.

In these findings the District Court is supported by overwhelming evidence including the unqualified admissions of defendant-appellant's plant manager, Alden W. Mackie. Mr. Mackie testified with reference to the operation of the Feather Ride structure as compared with the operation of the structure of the Knox patent, stating [R. 141]:

“Q. Will you describe the operation of the Knox structure in about the same manner as you did the operation of the Pointer tandem axle suspension?

A. This appears to operate in very much the same manner as the Pointer tandem axle suspension.”

Further Mr. Mackie testified [R. 142]:

“Q. In operation, how does the Feather Ride structure differ from the Knox structure, if it does?

A. It does not differ at all. In operation they are alike.”

In the Feather Ride structure as shown by Exhibit 3-A [R. 310-A] a trunnion rubber cushion is interposed between the end of the rocker arm entitled in this drawing "rear beam" and the axle. This rubber trunnion performs the same function in the same way to produce the same results as does the ball and socket universal joint illustrated in Figures 6, 7 and 8 of the Knox patent in suit. It provides the flexibility of connection between the rocker arm and the added axle which permits the two axles to move out of parallel and permits the structures to operate so that equal load distribution is had over the four wheels at all times. The equivalency of such rubber mounting is testified to by Mr. Mackie [R. 148]:

"Q. Do you know of vehicle suspensions where rubber is used between the rocker arm and axle of the suspension, serving as a universal joint? A. We use rubber as a universal joint in our own Feather Ride tandem axle suspension, \* \* \*"

In the Feather Ride construction as shown by Exhibit 3-A and as also shown by Exhibit 11 [R. 333] there is the same combination of parts operating together to produce the same result through the same cooperation of these elements. The appellant's Feather Ride structure is analytically set forth in Plaintiff's Exhibit 11 [R. 333]. It is here shown that the structure includes a bracket 6 in which there is utilized a pair of coil springs. These coil springs provide the sole spring suspension for the two axles as is accomplished by the laminated spring 3 (Fig. 1) of the Knox patent. There is thus the spring or set of springs on each side of the vehicle which provides the spring suspension means for the two axles 2 and 10a. The rocker arm 30a is connected to the rear beam or spring member 3. The axle 2 is secured to the member 3

intermediate the ends of that member 3. The left hand end of the member 3 is connected with a hanger through the medium of a pivot 3. The forward or free end of the member 3 is connected through the medium of connecting means 31 to the rocker arm 30a. The rocker arm 30a is then connected through the medium of the rubber universal joint with the added axle 10a.

With respect to this assembly, Mr. Mackie testified on direct examination [R. 149]:

“A. The springs are in a housing intermediate the ends of the rear walking beam.

Q. Is the rear walking beam and spring cluster mounted on the rear walking beam equivalent of a leaf spring? A. Yes, it is the equivalent of a leaf spring.”

The further complete equivalency of this assembly to that shown by the Knox patent is shown by Mr. Mackie's testimony with reference to the advertisement [Exhibit 75, R. 435], where Mr. Mackie describes the manner of assembly of the Feather Ride structure [R. 148, 149]:

“Mr. Cook: I would like to have the witness provided with Plaintiff's Exhibit No. 75, being a copy of Page 27 of the issue of April, 1946, of 'Power Wagon.'

Q. Will you describe the structure shown in that advertisement? A. The upper picture is the rear beam of the Feather Ride tandem axle suspension. It has a spring housing attached to the frame and bracket attached to the frame, and a connecting means from the bracket to the forward end of the walking beam.

Q. Single axle? A. That is a single-axle trailer suspension.



Q. When that single-axle suspension is converted to a dual-axle suspension, how is that accomplished?

A. When they convert a single-axle suspension to a dual-axle suspension, it is necessary to add the front walking beam with its axle and tires and the front walking beam bracket is attached to the frame in the vehicle to the front end of the front walking beam.”

Infringement is thus apparent and became a simple determination of fact from the admissions of defendant-appellant's production manager. *Finkelstein v. S. H. Kress & Co.*, 113 F. 2d 431, at 434 (Circuit Judge Augustus N. Hand, C. C. A. 2):

“The question here, as in all other cases where infringement depends on the use of equivalents, is whether the substitute functions in the same way as the original. If it be thought that it was not indubitably clear that defendant's device came within the range of equivalents to which the claims were entitled there was certainly no error in the trial for the judge left the question of infringement to the jury under instructions to find infringement if it determined that the defendant's device did ‘the same work in substantially the same way and accomplished substantially the same result.’ ”

The heart of the Knox discovery and invention was in the development of a flexible unit made flexible by the interpositioning of universal joints between the rocker arms and the added axle of the tandem axle suspension unit. This was an entirely new and radical departure from the workers in this art. A mere change in form of the adoption of this invention where known equivalents are utilized, the same combination operating through the



same mode of operation to produce the same results, will not avoid infringement.

In *Kings County Raisin & Fruit Co. v. U. S. Consolidated Seeded Raisin Co.*, 182 Fed. 59, at 63 (C. C. A. 9), Circuit Judge Gilbert said:

“It does not necessarily follow, from the fact that the claim describes a specific form of construction, that the inventor shall be limited to that form. All depends on his expressed intention, and the scope of the actual invention which he has made. If his improvement is but a narrow one, or if he has used language such as clearly to show his intention to limit his invention to a particular form described, then he is held to the language of his claim, and limited to that specific form. But if his is a pioneer invention, or one of such merit as to be entitled to a liberal construction, the claim will not be thus limited, even if couched in specific language, unless the inventor has also shown his positive intention to relinquish to the public all other forms in which his invention might be embodied.”

Here defendant's production manager has unequivocally stated the Feather Ride construction embodies the mode of operation of the Knox structure in its entirety and further states that the structure used to so adopt the Knox mode of operation is in all respects the known mechanical equivalent of that shown in the Knox patent. Defendant has clearly taken that which “is the substance of the invention.” This requires affirmance of the District Court's finding of fact that the Feather Ride structure is an infringement of the claims of the Knox patent (*Stebler v. Riverside Heights Orange Growers Ass'n*, 205 Fed. 735, 739).

It is amazing that appellant in his brief would so disregard the testimony of his own production manager as to make the statement that the operation of the Feather Ride structure is not similar to that of the Knox structure (Plaintiff's Brief 42). There is not an iota of evidence upon which appellant could rely in making such a statement. On the contrary, on direct examination, as heretofore pointed out, A. W. Mackie, production manager of defendant-appellant, stated that the structures "did not differ at all in operation" [R. 142]. The law which defendant-appellant cites and the points made in his brief are not supported by the evidence or supported by the testimony of its own witnesses given on direct examination. It is immaterial that one part of defendant-appellant's structure cannot be substituted for one part of the structure of the Knox patent. Such fact neither proves nor disproves infringement.

As heretofore pointed out in detail with reference to the prior art, defendant's activities do not fall within the scope of the prior art. The prior art teaches the necessity of the production of a rigid structure—a rigid structure which utilizes steering wheels in order to obtain operation. Knox is the first in the art to teach the necessity of making this structure flexible and in making the structure flexible he was able to do away with the steering of one pair of the tandem wheels and was enabled to obtain equal load distribution under all circumstances. Defendant's activities clearly do not fall within the teaching of the prior art. The "best" of this art, in accordance with defendant's expert which was before the District Court, appellant has now abandoned.

As said in *Eck v. Kutz*, 132 Fed. 758 at 766:

“\* \* \* The question is whether the inventive idea expressed in the patent has been appropriated; and, if it has, infringement is made out.

\* \* \* \* \*

“But with all this the operation is essentially unchanged not only of the whole but of each part; and that is the significant thing.”

### **Knox Is the Sole Inventor.**

Garner L. Knox is the sole inventor of the flexibly coupled tandem axle suspension system of the Knox patent in suit. To argue otherwise is to disregard the facts. Both Stebbins and Van Leuven, prior workers in this art, condemned the Knox flexible structure as inoperative. How can such facts fit with an assertion of joint conception of an invention jointly carried forward to a reduction to practice? The evidence shows that Stebbins, when his rigid structure failed, abandoned the project. Van Leuven insisted that to make the structure flexible would defeat its operation. The facts in this case are very similar to those which were before the Supreme Court in *Keystone Mfg. Co. v. Adams*, 151 U. S. 142. The facts are also very comparable with those present in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, 67 L. Ed. 523, 532. In *Keystone Mfg. Co. v. Adams* the invention made was in a corn shelling machine. The patent sustained differed from that of the prior art and of the invention of the father of the patentee only in that the invention of the son's structure reversed the direction of the revolving beater. In that case, as here, it was shown that the father's structure proved a failure in operation and was abandoned while

the son's structure proved a marked success. The structure with the reverse beater succeeded where the father's structure failed. The patent was a combination patent. The factor which vitalized the invention in the corn planter patent case was the reverse rotation of the beater. The patent could not be defeated upon the theory that the invention was the joint invention of father and son. The father had not conceived the vitalizing feature of the invention. Here the vitalizing feature of the Knox invention resides in the flexibility of the structure provided by the use of the universal joint between the rocker arm and the added axle of the tandem axle assemblies. Stebbins did not conceive this vitalizing feature of the invention.

In the *Eibel Process Co. v. Minn. & Ontario Paper Co.* case, the invention resided in a machine and the vitalizing characteristic of that combination patent lay in the changing of the pitch or of the inclination of a wire previously utilized in the earlier machines. This changing of the pitch of the wire, *i. e.*, of a single element of the combination, was what vitalized the patent and made the invention successful. The combination of the patent remained the same as the combination which had previously existed with the exception of the change made in the pitch or inclination of the wire. This resulted, however, in a successful combination and the patent was sustained.

Here the imposition of the universal joints between the rocker arms and the attachment axle made possible a difference in mode of operation as it permitted the two axles to move out of parallel. It made the entire structure flexible. The concept of Knox was that the structure to succeed should be flexible. The concept of Stebbins and Van Leuven was that the structure should be rigid.

There could be no joint invention of Knox and Stebbins. Each was proceeding in a diametrically opposite direction.

There is not one iota of evidence before this Court which would have enabled the District Court to have held that the invention of Knox was in fact the joint invention of Knox and Stebbins. The lower court therefore properly exercised its discretion, when during the trial defendant presented a motion to amend its pleading to assert that the invention of the Knox patent was the joint invention of Knox and Stebbins, in denying that motion [Finding of Fact 21, R. 23, 24].

### **The Invention of the Knox Patent Involved More Than Mechanical Skill.**

The District Court found that invention resides in the Knox patent and particularly in the combination as defined by claims 1, 2, 11, 15 and 17 thereof and in its Finding of Facts 7 and 8 has defined that invention. There is no evidence before this Court and none referred to in appellant's brief which would support a finding to the contrary. The Knox patent contains every element of a true invention. Knox proceeded upon a theory of operation contrary to that of the art before him. The art before him had failed. This factor is not controverted by appellant but is admitted. The art prior to the Knox invention proceeded upon the theory that in order to support the tremendous loads carried by vehicles requiring six wheels that it would be necessary to provide a rigid structure. Knox proceeded upon the theory that given flexibility the structure would attain equal distribution over the wheels of such a vehicle and would avoid the problems encountered in the art of "hanging up," excess tire wear, and distortion and bending of the parts because of their rigidity. There is no art prior to the



Knox patent which shows the imposition of a universal joint between a rocker arm and an added axle of a tandem axle suspension, or that suggests the necessity of flexibility in such tandem axle arrangement. On the contrary, the art teaches that such flexibility should be avoided.

The art has recognized the Knox invention and the principal manufacturers of this type of equipment have paid tribute to the Knox invention by operating under licenses under the Knox patent.

As is repeatedly held in cases of combination patents where there is a change which vitalizes the successful effort of an inventor and translates the prior failures to success, it is a wonder that other workers in the art did not see the solution first found by the patentee. It is easy to look backwards. It is first vision that distinguishes the inventor. Too many patents are held invalid because of the apparent obviousness of the solution of a difficult problem viewed retrospectively. Now that it is pointed out, it may seem quite obvious that by making the structure flexible one could overcome the problems of the wheels hanging up, the tires running out of true, and could at the same time obtain under all conditions of operation equal load distribution between the four wheels of a tandem axle construction. This is what appellant seeks this Court to find. See *Faries v. Brown & Co.*, 121 Fed. 547, 550, and *Diamond Rubber Tire* case, 220 U. S. 426.

The difficulty is in trying to place one's self in the position of where the prior art structures were failing and there was no Knox invention and to then see that by the relatively simple expedient of making the structure freely flexible by the use of universal joints between



the rocker arms and the added axle that all of the problems of the art would be eliminated. The District Court did not believe that at that time it would have been obvious. We agree entirely with the District Court that there is nothing obvious in the Knox invention—that it took a man of true vision to see that such a use of the old structure of universal joint interposed where Knox positioned the same would solve the many problems of this art. When suggested, Stebbins could not see it, but thought it would add greater difficulties to the structure which he was then working upon. When suggested, Van Leuven rejected it as involving a backward rather than a forward step. Stebbins and Van Leuven were skilled inventors in the art.

### Conclusion.

It is respectfully submitted that the judgment of the District Court in finding the Knox patent to be valid and infringed was in accord with the overwhelming evidence before that Court.

It is further submitted that appellant in designating his record before this Court and omitting from that record the "best" art in accordance with its own expert's testimony, and seeking to rely upon patents not discussed or considered before the District Court, has taken from this Court the ability to properly review and to comprehend the basis of the District Court's decision.

It is clear that the Knox patent is valid, solved serious problems in this art, has stood the test both before the Patent Office and before the Court, and is a valid patent. Its validity has been extensively recognized by the number of licenses granted thereunder and is sup-

ported by the commercial success which the structures made under this patent have attained.

The rule of law as laid down by our Supreme Court in *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U. S. 275, 88 L. Ed. 721, is therefore applicable.

Appellee therefore respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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R. W. POINTER, doing business under the fictitious  
name and style of Pointer-Willamette Co.,  
*Appellant,*  
vs.

SIX WHEEL CORPORATION, a Corporation,  
*Appellee.*

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**APPELLANT'S REPLY BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**In the United States**  
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R. W. POINTER, doing business under the fictitious  
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**APPELLANT'S REPLY BRIEF**

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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Plaintiff-appellee has repeatedly throughout its brief set forth the proposition that the questions of novelty, invention and infringement are questions of fact, and that these findings are supported by substantial evidence and should not be disturbed. Appellee overlooks two facts which constitute the basis of, and the relief sought, by appellant on this appeal, as follows: (1) The findings of fact are against the weight of the evidence, and (2) plaintiff's patent was not properly construed with reference to the prior art.

The findings of fact by the court may be set aside when clearly erroneous. (See Comments in Edmunds

Federal Rules of Civil Procedure, Pages 1275-1316; Simkins Fed. Practice, 3rd Ed., Sec. 523.)

Rule 52b of the Federal Rules of Civil Procedure provides:

“When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.”

In Simkins, 3rd Ed., Sec. 647, it is said there is no requirement that the findings must be excepted to in order to lay a foundation for review on appeal. See also Sec. 648, and in Simkins, 3rd Ed., pages 487-8, after stating the rule that when findings of fact are made in actions tried by the court without a jury the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings, and after stating this to be one of the most striking changes made in the new rules over the former practice, it is said that under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question of whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the qualification of the trial judge to pass on credibility. See in accord *Morley Contr. Co. vs. Maryland Cas. Co.*, 300 U.S. 185, 191.

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States vs. U. S. Gypsum Co. et al.*, (U.S. Sup. Ct.) 333 U.S. 364; 71 U.S.P.Q. 430.

In *Gasifier Manufacturing Co. vs. General Motors Corp.*, (C.C.A. 8) 138 F. (2d) 197; 59 U.S.P.Q. 259, Circuit Judge Sanborn of the Eighth Circuit Court of Appeals made the following statement of law as to the findings of the district Court:

"In a jury-waived case, the court is the trier of fact questions, and its determination of them, 'unless clearly erroneous,' is as conclusive upon review as is the verdict of a jury.

"A finding of fact of a district court is not clearly erroneous unless it is (1) unsupported by substantial evidence, (2) contrary to the clear weight of the evidence, or (3) induced by an erroneous view of the law. *Aetna Life Ins. Co. v. Kepler*, 8 Cir., 116 F. 2d 1, 4-5; *Kauk v. Anderson*, 8 Cir., 137 F. 2d 331, 333."

The question of what constitutes anticipation is one of law, as open for determination by the appellate court as by the district court. *Smith Kline and French Laboratories v. Clark & Clark*, (C.C.A. 3) 70 U.S.P.Q. 382. In the instant case there are few, if any, of the essential or controlling facts in dispute. Whatever dispute exists has to do with the conclusions drawn from the facts. The question, therefore, is whether the court's conclusions are correct. True it is, the trial court has the primary function of weighing the evidence and finding the facts, and appellant is bound by the findings if they are

supported by the evidence. The rule, however, does not operate to entrench with like finality, the ultimate fact conclusions drawn therefrom. *United States v. Anderson Co.*, 119 F. (2d) 343; *Murray v. Noblesville Milling Co.*, 131 F. (2d) 470; *Mid-Continent Inv. Co. v. Mercoid Corp.*, 113 F. (2d) 803; *J. S. Tyree, Chemist, Inc. v. Thymo Borene Laboratory*, (C.C.A. 7) 67 U.S.P.Q. 200.

In *Copeman Laboratories Co. v. General Plastics Corp.*, (C.C.A. 7) 149 F. (2d) 962, 65 U.S.P.Q. 550, in a patent infringement suit defendant relied upon the prior art as being anticipatory and also showing want of invention. Circuit Judge Major said:

“The lower court treated it as analogous, and we are of the view that the issue raised on this appeal depends in the main on the court’s finding in this respect. The sole testimony on the subject was that of an expert witness who expressed the opinion that it was non-analogous. The question must be determined from an examination of the prior art itself. Under such circumstances, we think we are free to reach a conclusion as to its applicability.”

Walker on Patents, Deller’s Edition, Sec. 749, reads as follows:

“If the finding of the judge be a special one, it will be conclusive on the facts found; but ‘the sufficiency of the facts found to support the judgment’ will be open to review in the Circuit Court of Appeals.” Citing cases.

It is well settled law that the construction of patents involves a question of law, and is therefore a matter for the trial judge to determine in the first instance, and is subject to review by the appellate court on appeal. The

leading authority on patent law, Walker, (Deller's Edition) pages 1209-1210 states: "Since letters patent are contracts, questions of construction are questions of law for the judge, not questions of fact for the jury." And again on page 1907, Walker states: "Construction of patents is a point of law."

It has been held by the United States Supreme Court in *Mahn v. Harwood*, 112 U.S. 354, 358, that whether the thing patented amounts to a patentable invention is a question of law to be decided by the courts.

Judge Biggs of the Third Circuit Court of Appeals in the case of *Minnesota Mining and Manufacturing Co. et al. v. The Carborundum Company et al.*, (C.C.A. 3, 1946) 155 F. (2d) 746; 69 U.S.P.Q. 289, 291, stated:

"But quite apart from the foregoing the words of a patent or a patent application, like the words of specific claims therein, always raise a question of law for the court and may not be determined by the opinion of experts. *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30; *Solomon v. Renstrom*, (C.C.A. 8) 150 F. 2d 805, 807."

Much of the evidence in the case at bar is in the form of exhibits, particularly the prior art patents. These exhibits must necessarily have been construed by the District Court. The decision in *Kaeser and Blair, Inc. v. Merchants Association, Inc.*, (C.C.A. 6, 1933) 17 U.S. P.Q. 357, 358, is applicable.

"The finding of unfair competition was based upon exhibits introduced in evidence. This court [Circuit Court] therefore cannot give to the finding the weight that attaches to a finding of fact where the court [District Court] has heard witnesses in

open court, but must draw its own deductions and conclusions from an examination of the exhibits.”

Accordingly, the prior art patents introduced as evidence and designated for the record on appeal are the proper subjects of review by the Court of Appeals in determining whether or not the Honorable District Court properly construed the claims in determining the issues of infringement and the validity of the claims.

### Prior Art Patents

The appellee seeks to nullify the effect of the prior art—first by saying that appellant has abandoned its position before the District Court with respect to these prior patents; and second that the prior art discloses structures which are impractical and inoperative.

The patents relied upon by defendant to anticipate or limit the claims of the letters patent in suit are, in the order of their presentation to defendant’s expert witness, as follows:

*Spencer	British, No. 8262 of 1906	Defendant’s exhibit	59
*Smith	1,111,924	“	“ 38
*Collard	1,131,118	“	“ 39
*Laisne	1,316,369	“	“ 45
*McCracken	1,527,987	“	“ 50
*Mohl	1,534,458	“	“ 51
*Richards	177,156	“	“ 31
*Jeffries	174,533	“	“ 30
*Pratt	878,156	“	“ 32
*Brillie	915,733	“	“ 35
*Pichoud	1,147,439	“	“ 40
Parks	1,239,211	“	“ 41
*Furlong	1,436,031	“	“ 48
*Stebbins, et al.	1,562,265	“	“ 52



*Van Leuven	1,655,481	"	"	56
*Fageol	1,692,891	"	"	58
Gros	British, No. 18,943	"	"	60
Baines	British, No. 214,080	"	"	62
Janvier	German, No. 209,994	"	"	66

IN EACH AND EVERY INSTANCE DEFENDANT'S EXPERT WITNESS SHOWED HOW THE CLAIMS OF THE KNOX PATENT IN SUIT ARE READABLE ON THE STRUCTURES OF THESE SEVERAL PRIOR ART PATENTS. Appellant has not abandoned the position indisputably established by its expert witness in this regard. The patents marked with an asterisk (\*) are those relied upon by appellant on this appeal.

On cross examination Dr. Clark admitted that the structures disclosed by *three* of these patents were impractical. These were the structures of British Patent 18,943 to Gros, British Patent 214,080 to Baines, and German Patent 209,994 to Janvier. Dr. Clark said: "I doubt whether it [the structure of British Patent 18,943] would work out to be practical." (R. 254). Of the German patent Dr. Clark merely said: "I would not care to own a vehicle like that." (R. 252). Dr. Clark stated that the structure of British patent 214,080 would not be practical on a four wheel vehicle. (R. 259). Summarizing Dr. Clark's statements regarding these three prior art patents: one is impractical; he would not care to own another; and another would be impractical on a four wheel vehicle. These are but *three* out of 39 patents, and no one of these three are among those relied upon by appellant on appeal. Moreover, NO TESTIMONY

WAS OFFERED THAT THESE STRUCTURES WERE INOPERABLE. How then can the District Court say that the prior art patents relied upon by the defendant to anticipate or limit the claims of the letters patent in suit are, as established through defendant's expert, Dr. Clark, either impracticable or inoperative? It is submitted that finding of fact No. 20 is clearly erroneous.

Appellee says that appellant does not now rely upon patents chosen by its expert witness to be the "best" of the 39 patents listed in its pleading, and therefore has abandoned the position of its own expert before the District Court with respect to these prior patents. An examination of the record does not clearly reveal just what was the "position of defendant's expert before the district court". Dr. Clark had read claims 1, 2, 11, 15 and 17 of the patent in suit on the disclosures of the patents hereinbefore listed. On cross examination, plaintiff's counsel asked these questions:

"Which of the patents which you have testified concerning do you consider as being close in *showing the disclosure* of the Knox patent?" (R. 234).

"Take the *structure* as disclosed in the *drawings* of the Knox Patent \* \* \*." (R. 234).

"Which of the patents do you consider to be close to showing the elements of the Knox patent, as shown in the drawings?" (R. 235).

The witness complained: "I don't know what you mean by close in reference." which elicited the question:

"Close in reference *as shown in the drawing* of the Knox patent and as described in the specifications?"

The witness demurred when asked to pick out the prior art patents which he considered as closest to the structure. He said: "I can't do that now \* \* \* because you haven't defined what you mean by 'structure'. Is it appearance, elements and, if not, why not put your question in the form as to which one meets the claims, and then I will tell you, because I have that information here." (R. 237).

Thereupon plaintiff's counsel asked:

"Which one of the patents do you consider the closest to the structure, having the mode of operation and the structure as defined in the specification and drawings of the Knox patent, the patent in suit?" (R. 238). And again:

"Now, will you simply pick out what you consider to be the best patent with relation to *the form of the invention* shown on page 1 of the Knox patent in suit, and I mean the best." When the witness said that there is none that corresponds in detail to that shown in the Knox patent, then plaintiff's attorney countered with the question: "In structure, function and mode of operation?" To which defendant's witness refused to agree. (R. 247-248).

All in all the cross examination of defendant's expert witness was a highly successful attempt to confuse the witness, the court and even defendant's counsel. When defendant's counsel asked to be enlightened as to

whether plaintiff's questions related to mode of operation, or structure, or function he was told, in effect, to mind his own business. The cross examination of defendant's witness was highly irrelevant and immaterial and was not helpful to either the District Court or the Court of Appeals in ascertaining which is the "best" of the prior art patents. "Best" in what respect? Certainly, not as being anticipatory of the structure defined by the claims in suit.

Appellee persuaded the District Court that since the prior art patents cited by appellant do not *look like* the device illustrated in the drawings of the Knox patent, they cannot possibly anticipate structure defined by the claims of the patent in suit. The purpose of the prior art patents relied upon by appellant is to show structures *defined by the claims* of the patent in suit; and it is immaterial that the prior art devices do or do not resemble the structure shown in Knox's drawings. The cross examination of defendant's expert witness was intended to point out how Knox's device differed in appearance from the prior art structures, but Knox did not limit his claims to so distinguish from the prior art. It is the claims that measure the invention—not the drawings. *Smith v. Snow*, 294 U.S. 1, 11, cited with approval in *Universal Oil Products Co. v. Globe Oil and Refining Co.*, 322 U.S. 471 (1944). If Knox made a patentable invention, he failed to define it, either deliberately or inadvertently, in terms which avoid the prior art. Appellee's concept of prior art apparently is different from the accepted concept of the courts. Appellee seems to think that to be prior art, there must be a successful,

working, operative structure, identical to the device for which patent is applied. Such a concept takes no cognizance of the teaching of prior art patents unless they are in identical form to the device of the patent. This is not the law.

Even an inoperative reference may be considered by the court for whatever idea it discloses. *Rosemary Mfg. Co. v. Halifax Cotton Mills, Inc.*, (C.C.A. 4, 1919) 257 F. 231. Though the reference device be inoperative as a whole, it may be anticipatory as to that portion which is operative. *Motor Improvements, Inc. v. General Motors Corp.*, (C.C.A. 6, 1931) 49 F. (2d) 543; 9 U.S. P.Q. 360; certiorari denied 284 U.S. 663. And if the skill of the artisan would make the reference instrumentality operative, it may be effective as an anticipation. *Carlson Hoist and Machine Co. v. Builders Equipment Corp.*, (C.C.A. 2, 1938) 96 F. (2d) 145; 37 U.S.P.Q. 561.

The United States Patent Office is a treasure house of ideas, and to be patentable, the device must be defined in terms which do not read on these disclosures. There is no need to make inquiry as to whether the prior patented device was ever used, or as to what success attended the use. Its disclosure speaks for itself. Its success or failure depends on factors, such as its timeliness and the promotional effort placed behind it. One does not see on the road today structures which resemble the Knox drawings. In fact, the structure shown in Figure 1 of the Knox patent was abandoned within six months of its first reduction to practice (R. 90); and the use of the structure shown in Figures 6, 7 and 8 was discontinued in 1927 or 1928 (R. 104), before the patent

issued. The type of suspension used on trailers currently manufactured by plaintiff-appellee is similar to that shown in Stebbins et al. patent 1,562,265. (R. 105).

Obviously, the "best" prior art patent, insofar as constituting an anticipation of the structure defined by the Knox claims in suit is concerned, is the patent to Van Leuven, 1,655,481. Appellee says that Van Leuven shows a rigid type structure, and that Van Leuven believed it necessary to steer the added non-driven wheels.

The Van Leuven patent was owned by appellee (R. 120), and up to the date of expiration of the term of the patent appellee brought suit under both the Van Leuven patent and the Knox patent. *Six Wheel Corp. v. Sterling Motor Co. of California*, 40 F. (2d) 311.

The Van Leuven patent was involved in interference No. 55,455 involving also an application by Harry Y. Stebbins covering the structure disclosed in Figure I of the Knox patent in suit, except that he did not provide a *universal joint* between the rocker arm and the axle of the attachment. Priority of invention was awarded to Van Leuven, and it will be noted that claims 10 and 12 of Van Leuven read upon the structure of the Knox patent. In Van Leuven the rocker arm takes the form of a leaf spring 29. It will be remembered that Mr. Knox testified that a leaf spring is the equivalent of a universal joint (R. 113); and that transverse tilting of the axle is taken by the springs. In this, Knox is in agreement with the statement appearing on page 3, lines 72-77 of the Van Leuven patent, which reads:



"If the up and down motion of the auxiliary wheels 43 is excessive, owing to extreme irregularities in the road surface, such motion will be taken care of by turning of the springs 29 about the fulcrum point of said springs, namely, the studs 34."

Van Leuven's claims 10 and 12 recite that the levers (springs 29) are mounted for independent equalization on opposite sides of the frame. There could be no independent equalization of these springs except that the axle 41 of the attachment could assume a position of irregularity or angle to the driven axle. In fact the Van Leuven structure more nearly conforms to the definition of the Knox claims in suit that does the structure shown by Knox's drawing, for the reason: In the Knox structure the rocker arms are rigid beams, and are connected to the axle of the attachment by steel bearings, and both axles 2 and 10 are maintained in spaced relation by radius arms 32 and 21 of invariable length; whereas in Van Leuven, due to the flexible beam 29, the axle 41 does not have vertical movement only, but may approach toward or move away from the driven axle, as clearly illustrated in Figure 9 of the drawings.

The mechanism provided by Van Leuven for steering the added wheels in no wise detracts from or interferes with distribution of the load to the added wheels of the six wheel attachment.

Appellee offers no criticism of the structure of Stebbins Patent No. 1,562,265 other than that Stebbins had provided means for steering the wheels of the added axle. It is undisputed that the Stebbins structure functions to equalize the load between the intermediate carrier

wheels and the driven wheels, and all of the testimony as to the impracticability or inoperability of the Maxi type structures because of the steerability of the added wheels is wholly irrelevant and immaterial to the present issue. That this is true is shown by the testimony of Mr. Knox who stated that the type of suspension used on trailers currently manufactured by appellee is the structure shown in the Stebbins patent, except that no means is provided for steering the wheels of the added axle, and that the springs are journaled on the axles. It is clear therefore that appellee's attack on these prior art patents on grounds of impracticability and inoperability fails for lack of materiality to the issues of the instant case, and there is no testimony in the record to substantiate finding of fact No. 20, which says:

"That the prior [art] patents relied upon by defendant \* \* \* are \* \* \* either impractical or inoperative, \* \* \*."

### Infringement

The question of infringement, in the case at bar, is a matter of law, because the evidence concerning infringement is undisputed. Plaintiff submitted no evidence of infringement other than as to identity of the alleged infringing device and the manufacture and sale thereof by the defendant, and defendant's evidence was directed toward the validity of the patent in view of the prior art patents. The nature and identity of the alleged infringing device is undisputed, and a full description including a model is before the court. The issue to be

decided was, therefore, one of construction of the Knox patent as to whether or not the claims in suit read upon the alleged infringing device, and if they so read, whether they also read, construed in like manner, upon prior art patents. See *I. T. S. Rubber Co. v. Essex Rubber Co.*, 270 F. 593, wherein the court stated at page 598: "Upon undisputed evidence infringement or non-infringement is a question of law. *Singer Co. v. Cramer*, 192 U.S. 265, 275; *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 36."

The situation here is one in which the plaintiff offered no evidence of infringement other than the undisputed evidence concerning identity of the alleged infringing structure and the fact of manufacture and sale by the defendant, which is admitted. The defendant offered evidence that the claims were invalid as reading on the prior art, *which was not refuted by the plaintiff*. Notwithstanding this state of the evidence, the judge made findings of fact in favor of the plaintiff, and we have the anomalous situation of a plaintiff receiving a judgment when it did not establish a case, and when the defendant established a preponderance of evidence showing invalidity of the claims in suit.

The case at bar is not substantially different from the case of *Gasifier Manufacturing Co. v. Ford Motor Co.*, (D.C. E.D. Mo., 1939) 43 U.S.P.Q. 377, wherein Judge Collet in ruling on a motion for summary judgment summarized questions of law and fact involved in that case in the following language:

"But, in order to submit an issue of fact to the jury there must be an issue of fact existing, and if all

those facts are admitted—if the patent and its operation is admitted, as it is, if the infringing device is before the court as it is, and its operation is not disputed, as is the case in this instance, then when the evidence is all in it will be my duty to apply the law of equivalents and say to the jury that under all of these conceded facts the application of the law results in this device being placed in the classification of a similar device, or, that it is placed in the classification of one that is not similar. I must answer that question as a question of law before I submit the case to the jury, and if I have all those facts before me now, I must determine that question now. The question therefore resolves itself into a question of law as to whether, applying the law of equivalents, with all the facts admitted, which under the law of equivalents this assailed device or accused device, however it may be referred to, is a similar device.”

Although the case at bar was not disposed of on summary judgment, and although there was no jury, the situation is almost identical to that described by Judge Collet. There was no dispute as to the nature and the operation of the infringing device. The question is whether the claims of the Knox patent are valid, and whether those claims read on the alleged infringing device. These questions cannot be resolved without a construction of the claims and the Knox patent in general. It is in this respect that the District Court committed error, and these are the questions, questions of law, that appellant asks the Honorable Court of Appeals to review.

Appellant maintains that the District Court did not properly construe the claims of the Knox patent, for

when these claims are construed so broadly as to find infringement of the Knox patent by the Feather Ride structure, then those claims read on the prior art, and are therefore invalid. This is the issue which appellant asks the Honorable Court of Appeals to decide, and appellant submits that it is a question of law, and not one of fact.

It is also well settled law that the claims may not be construed so broadly, by the doctrine of equivalents, in order to read on the alleged infringing device, that they also read on the prior art, and if so construed, the claims are invalid. That, appellant contends, is exactly and precisely the situation in the case at bar, and constitutes the error made by the District Court.

Circuit Judge Biggs of the Third Circuit Court of Appeals in the case of *Minnesota Mining and Manufacturing Co. et al. v. The Carborundum Co. et al.*, (1946) 155 F. (2d) 746; 69 U.S.P.Q. 289, 291, stated: "But quite apart from the foregoing the words of a patent or a patent application, like the words of specific claims therein, always raise a question of law for the court and may not be determined by the opinion of experts. *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30; *Solomon v. Renstrom*, (C.C.A. 8) 150 F. (2d) 805, 807." With this pronouncement of the law plaintiff's attorney seemed to be in agreement. He said:

"Mr. Cook: Are you willing that these copies speak for themselves?

"Mr. Lyon: Certainly. The testimony won't add anything to them." (R. 213).

## Stebbins and Knox Are Joint Inventors

In January, 1925, Stebbins brought to Utility Trailer Manufacturing Company a six wheel attachment. Knox suggested the need for more flexibility in the attachment. Stebbins "agreed that some universal action would be an improvement." Stebbins' salesman, Clune, made sketches of a form of universal joint which could be incorporated in the six wheel attachment Stebbins had in production. Tracings were made by Stebbins' draftsman. These sketches were earlier than Knox drawings B. C. and D. Knox's only contribution was to recommend a universal joint of a different form than that submitted by Stebbins. A universal joint was not employed until Utility Trailer Company took over the manufacture and sale of the attachment under license from Stebbins, as Mr. Knox "was not positive that the Stebbins construction might not stand up sufficiently well to be satisfactory, and so did not insist on complicating the mechanism until his type had been put into service." (p. 71, Inf. 55, 383). Stebbins and Knox are joint inventors.

## Knox Structure Did Not Involve Patentable Knowledge or Invention

The courts have repeatedly held that before a valid patent may issue it must appear that the new device, however useful it may be, must reveal not merely the skill of the art. There must be an innovation for which society is truly indebted to the efforts of the patentee. *Sinclair & Carroll Co. vs. Interchemical Corp.*, 325 U.S. 327, 330; 65 U.S.P.Q. 297, 299. And while it is true that



the act of putting together old elements which gives them an added value may entitle one to claim "Invention", the combination must be one for which exceptional imaginative talent was necessary. *Gelardin vs. Revlon Products Corp.*, (C.C.A. 2) 164 F. (2d) 910, 911; 76 U.S.P.Q. 154, 155.

\* \* \* \* \*

It is respectfully submitted that the decree of the District Court is clearly erroneous and should be reversed.

Respectfully submitted,

HAROLD L. COOK,

LEE R. SCHERMERHORN,

Attorneys for Appellant.



**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

R. W. POINTER, doing business under the fictitious  
name and style of Pointer-Willamette Co.,  
*Appellant,*

vs.

SIX WHEEL CORPORATION, a corporation,  
*Appellee.*

---

**PETITION FOR REHEARING**  
**AND BRIEF IN SUPPORT THEREOF**

---

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**PETITION FOR REHEARING**  
**AND BRIEF IN SUPPORT THEREOF**

---

Comes now the appellant, R. W. Pointer, by his attorneys, and petitions the Court of Appeals for a rehearing under Rule 25 in the matter of the opinion filed September 27, 1949, in the above entitled cause. Appellant requests the rehearing on the ground that the opinion rendered by the Court is not dispositive of all the grounds of appeal, and that, even without questioning the correctness of the holding of the opinion as to each issue considered by the Court, there remain issues undecided by the Court which should be found in favor of appellant and which would result in the reversal of the judgment of the District Court.

Fundamental questions presented in appellant's brief on appeal have not yet been decided. Although the court has discussed the preliminary questions of invention and invention, it has not made any determination of the validity of the claims of the patent in suit; it has not applied the Knox claims in suit to defendant's structure to support a holding of infringement; and it has not disposed of defendant's contention of justification by reason of prior art.

Appellant also requests rehearing on the ground that the Court of Appeals has erred in its application of the law of the doctrine of equivalents, both as to the drawing of conclusions of equivalency of structure based on similarity of operation, and in applying the doctrine of equivalents without regard to the definitions of the claims or the limitations imposed by the prior art; and that the Court of Appeals has erred as to the weight to be accorded the prior art cited by defendant-appellant.

Appellant summarizes the points which he desires the Honorable Court of Appeals to consider, reconsider, and rule upon, as follows:

1. That claims 1, 2, 11, 15 and 17 of the Knox patent in suit are invalid in view of prior art cited by appellant which was not considered by the Patent Office during the prosecution of Knox's application for patent.

2. That claims 1, 2, 11, 15 and 17, construed so as to read upon defendant's alleged infringing device, are invalid for the reason that, construed in the same manner, they read upon the prior art, for example, letters patent



to Jeffries 174,533; Pratt 878,156; Naeser 1,414,147; Van Leuven 1,655,481; and British Patent No. 8262 to Spencer.

3. That the defendant's activities fall within the scope of the prior art patents No. 878,156 to Pratt; No. 1,534,458 to Mohl; British Patent No. 8262 to Spencer; and No. 1,655,481 to Van Leuven.

4. That the Court of Appeals has erred in its application of the doctrine of equivalents to find infringement based upon identity of function, and in its conclusion that identity of structure results from identity of function, without applying the doctrine of equivalents in the same way to compare Knox with the prior art, such as the patents to Pratt 878,156; Stebbins et al, No. 1,562,265; Van Leuven 1,655,481; Naeser 1,414,147; and British patent to Spencer 8262/1906.

5. That the Court of Appeals erred in applying the doctrine of equivalents to the functions, results and manner of operation of the Knox structure rather than in its proper role of interpretation of the patent claims.

6. That the Court has mistakenly considered the prior art to be "paper" art and has failed to accord due weight to the prior art under the erroneous belief that if it were impractical, it was not competent or operative.

Wherefore, appellant prays the Honorable Court of Appeals to grant a rehearing as requested in order that the above points which are material and essential to a proper disposition of this case may be resolved or clarified, and that the appellant may have a fair, just and

complete determination of this controversy, and that the public may know whether or not the Knox claims in suit are valid, and if valid, in what manner and to what extent.

Done at Portland, Oregon, this 26th day of October, A.D., 1949.

HAROLD L. COOK,  
LEE R. SCHERMERHORN,  
Attorneys for Appellant.

By .....

STATE OF OREGON        )  
                                  ) ss.  
County of Multnomah    )

I, Harold L. Cook, of the firm of Cook and Schermerhorn, attorneys for Appellant, hereby certify that I prepared the foregoing Petition for Rehearing in the above entitled cause, that in my judgment it is well founded in law and in fact, and that it is not interposed for purposes of delay.

.....  
Of Counsel for Applicant

**In the United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

---

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vs.

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*Appellee.*

---

**BRIEF**  
**IN SUPPORT OF APPELLANT'S PETITION FOR**  
**REHEARING UNDER RULE 25**

---

Points 1 and 2 stated for consideration by the Court  
of Appeals in the Petition for Rehearing are as follows:

1. That claims 1, 2, 11, 15 and 17 of the Knox  
patent in suit are invalid in view of prior art cited  
by appellant which was not considered by the  
Patent Office during the prosecution of Knox's ap-  
plication for patent.

2. That claims 1, 2, 11, 15 and 17 construed so  
as to read upon defendant's alleged infringing de-

vice, are invalid for the reason that, construed in the same manner, they read upon the prior art, for example, letters patent to Jeffries No. 174,533; Pratt, 878,156; Naeser 1,414,147; Van Leuven 1,655,481; and British Patent No. 8262 to Spencer.

Because of their similarity, these points are treated together herein, except as specifically noted.

The Court of Appeals has not passed upon appellant's Group I Specification of Errors and Points and Authorities thereon (appellant's Brief on Appeal, pages 14 and 16 respectively) to the effect that the claims of the Knox patent are invalid for the reason that, construed so as to read upon defendant's alleged infringing device, the claims also read, construed in the same manner, upon the devices of the prior art. The Court has not construed the Knox claims. The Court devoted 5 pages of its decision to preliminary considerations, 7 pages to the question of invention, and slightly over one page to the question of infringement, but nothing to the question of validity.

Thus far, the Knox improvement has been considered by the Court entirely apart from the actual patent grant defined by the claims. There may as well have been no claims at all so far as necessary to the decision of the District Court or the holding of this Court. Conclusions of validity and infringement must be based on the claims of the patent to determine what remains in the public domain and what has been appropriated to the exclusive use of Knox for the term of the patent.

It is axiomatic in the law *that claims which read on devices of the prior art are invalid for improper mo-*

*nopoly*. A patentee is not permitted to draft claims in terms such as to dominate the devices prior to him, and thereby relegate such prior devices to the position of infringing structures.

The purpose of the patent statutes is to carry out the provisions of Article I, Section 8 of the Constitution, "To promote the progress of science and the useful arts." A patent is a contract between the inventor and the people, represented by the government. The patent statutes require that the subject matter of such contracts be made definite and certain by including in the patent a claim "particularly pointing out and distinctly claiming the part, improvement, etc." which the inventor considers as his invention (Section 4888 R.S.) in order that the public will know definitely just what is contained in the contract for a seventeen year monopoly by an inventor and so may avoid infringement during the life of the patent. Unless an inventor's patent complies with statute, it is invalid; hence it must follow that a patent cannot be interpreted in such manner or with such looseness or disregard for the specific terms of its claims as to defeat the provisions of the patent statutes. Appellant here contends that the decision of the appellate court has sanctioned such a loose and improper construction of the Knox patent as to defeat the express provisions of the patent laws.

The patent statutes provide that the inventor upon making application for patent shall execute an oath that the invention *defined by the claims* of his patent is new and has not been known or used or published before

his invention or discovery thereof. Further, the United States Patent Office provides an examination system to make a search of the prior art and require that the claims of the patent be limited to that which is new before the patent contract can be executed between the inventor and the people as represented by the Patent Office. There is no requirement that the specification and drawings of the patent be limited to that which is new, because the new part or improvement could not be understood without reference to that which is old. Therefore, the greater part of every patent, and this is especially true of the Knox patent, consists of a disclosure of that which is old and including the new part or element defined by the claims of the patent contract.

The object of any invention or improvement is to solve some problems in an art. These objects are usually set out in the beginning of the patent specification and state the problem as it existed prior to the invention disclosed in the patent. Each of the many different patents in any particular classification of a specific art is distinguished from the other patents in that art by the means employed to solve the problem. The Knox patent is such a patent. Knox's patent contract with the people for a seventeen year monopoly embraces and is limited to certain specific mechanical devices for accomplishing the same result and function sought by numerous other patentees prior to the Knox invention. Eighteen prior patents are cited by appellant on Appeal. The District Court, however, and now the Appellate Court, has disregarded the devices disclosed in prior



published patents of other patentees for attaining the same results, and both courts base their decisions on infringement on the mere holding that the defendant's Feather Ride structure also seeks to accomplish the desired result set out in the *objects* of the Knox patent.

Neither the District Court nor the Appellate Court actually found that defendant's structure responded to the definition of the Knox invention *as defined by the claims* of the Knox patent, but merely drew this inference because the same desirable result was accomplished. This desirable result, however, as is usually the case, was well recognized in the art, and each of the eighteen patents was granted for a particular mechanism for accomplishing the result. It should be self-evident that, were this fact not true, the Patent Office would have issued only one patent on a tandem axle suspension, and this long before Knox's improvement. The Knox improvement would have had to be many years earlier in order to conclude that the patentee was entitled to dominate all other means for performing the same desired function and result, and to justify disregarding the *claims* which define the terms of the contract executed between the inventor and the people of the United States. Neither the District Court nor the Appellate Court has explained to the people or to the appellant how the specific terms of Knox's contract with the people (the claims) apply to defendant's structure. It is most urgently contended that appellant is entitled to know just what means and structures are covered by the terms of Knox's patent.

It was clearly established in the early days of our present patent system in the celebrated case of O'Reilly v. Morse, 56 U.S. (15 How.) 61, 105 et seq. (1853), that a patentee, having devised a particular means for accomplishing a desired result, could not obtain a patent on the function or result itself. This is sound logic, because the desirability of the function or result was admittedly well recognized prior to the invention. Hence the Patent Office did not grant Knox a patent on the function or object of the invention, which existed before the improvement was made, but on a specific means for performing the function, and any holding that Knox's claims are of sufficient scope to cover the desired function or result must be clearly contrary to statute and in conflict with the constitutional mandate.

The "doctrine of equivalents" has been evolved to provide a certain amount of elasticity in the patent claims and to do equity to a patentee where his patent attorney has unduly restricted his claims. The doctrine of equivalents in effect amounts to judicial reformation of the claim, but in equity it must not violate the right of the people to enjoy the free use of that which is already in the public domain. Thus, under the doctrine of equivalents, it is true that the specific terms of the Knox claims may be given broader interpretations than the strict dictionary definitions, *but only to the extent that these interpretations do not take away the enjoyment of some right to which the public is entitled.*

The doctrine of equivalents cannot extend to result or function, because that would both take away from

the people the enjoyment of other means which have been in the public domain and remove the incentive for devising new means.

Before proceeding with the argument, appellant desires to point out that even though the Court has found that the Knox patent involves invention, such opinion is not conclusive on the issue of validity. Even though it be conceded that Knox made an invention, the claims must nevertheless correctly define that invention in order for the patent to be valid. If the claims are drawn so broadly that they read on the prior art, they are invalid and the patent is unenforceable even though it disclose meritorious invention. In such a case, the patent may be saved only by restricting the interpretation of the terms of the claims to the disclosure of the drawings and specifications.

Appellant believes that neither the District Court nor this Court has given a proper measure of attention to the claims of the Knox patent, either for the purpose of the definition of Knox's invention, or for the purpose of comparing defendant's Feather Ride structure in terms of the Knox invention as defined by his claims. These questions, which are fundamental in any patent infringement case, have been entirely obscured by talk about problems of the art, results accomplished, contribution to the art, methods of operation, and *similarity of operation* of the Knox invention and the defendant's structure.

The Knox patent may as well have had no claims at all so far as necessary to support any findings made by

the District Court or the opinion rendered by the Court of Appeals. True, the District Court in Findings of Fact 13 makes the bald declaration, which is no more than a formal conclusion of law, that the defendant's structure infringes claims 1, 2, 11, 15 and 17 of the Knox patent. Moreover, attention is particularly invited to Finding 9 of the District Court (Tr. 20) to the effect that the defendant's structure "embodies each and every element of *the invention*" of the Knox patent. Infringement must be *of the claims* and not of that intangible and undelimited entity referred to as the invention. The rule was stated by the Supreme Court in *Smith v. Snow*, (1935), 294 U.S. 1, 11; 24 U.S.P.Q. 26, 30, as follows:

"\* \* \* the claims of the patent, not its specification, measure the invention. Paper Bag Patent Case, 210 U.S. 405, 419; *McCarty v. Lehigh Valley R. Co.*, 160 U.S. 110, 116; *Winans v. Denmead*, 15 How. 330, 343."

*Smith v. Snow* has been cited with approval in *General Electric Co. v. Wabash Appliance Corp.*, 304 U.S. 364 (1938), 37 U.S.P.Q. 466; in *Saco-Lowell Shops v. Reynolds*, C.C.A. 4, (1944), 141 F. (2d) 587, 593-595, 61 U.S. P.Q. 3, 9; and in *Universal Oil Products Co. vs. Globe Oil & Refining Co.*, 322 U.S. 471 (1944).

Defendant's structure is a different combination from the plaintiff's and was never contemplated in plaintiff's inventive concept. There is no semblance of copying of the plaintiff's structure, which is always necessary before the doctrine of equivalents is to be applied. Obviously, the defendant's Feather Ride structure does not look

like the Knox patent. The arrangement of parts is entirely different, which alone should be sufficient to remove all doubt of infringement of claims defining an invention which resides in the novel combination of parts. Were there to be identity of operation, there should be mutuality of operation. Exhibit 75 clearly shows that "the axle of the attachment" in the Feather Ride suspension is added to the vehicle by use of a front walking beam. This front walking beam is not interchangeable with nor does it perform the same function as does the rocker arm in the Knox construction. Moreover, it is not pivoted intermediate its ends on hanger brackets affixed to the vehicle frame. This showing constitutes further proof, if such were needed, that the combination of parts employed in defendant's Feather Ride structure is a different combination of parts than is employed in the Knox patent, and that the two combinations are not identical in operation.

Appellee has created the impression that since the prior art patents cited by appellant do not *look like* the device illustrated in the drawings of the Knox patent, they cannot possibly anticipate (For example, see page 15 of appellee's brief, where it discusses structural differences; page 23 where it compares the drawings of Knox and Fageol). Appellee insists that the bogey disclosures are non-analogous art (Page 20, appellee's brief). Appellee overlooks the purpose of prior art patents, even if they are non-analogous art. That purpose is to show a structure defined *by the claims of the patent* in suit. It is immaterial whether the prior art

devices look like Knox's drawings. He did not patent the drawings! Appellee points out how Knox's device differs from the prior art, but he did not limit his claims to distinguish from the prior art. Remember—it is the claims that measure the invention—not the drawings.

If Knox's claims were limited to define only the device illustrated in his drawings, his comparison with the prior art might be pertinent to the issue of anticipation. But such is not the case.

It is immaterial whether these prior art devices were operative or successful, if they show the elements defined in Knox's claims. Despite all appellee's attempts to becloud the issue, the sole question for determination by the Court is: "*Can the claims of Knox be read on the devices of the prior art patents?*" If Knox made any contribution to the art, he failed to define it, either deliberately or inadvertently, in terms which avoid the prior art, and his patent reads on the prior art and dominates all structures resembling the prior art. Defendant-appellant has a right to take from the prior art that which is disclosed therein, but under the Knox patent, construed in the manner of the District Court's findings, and the Honorable Court of Appeal's opinion, he is precluded from such right.

Appellant has selected the prior art patents to Jeffries, No. 174,533; to Pratt, No. 878,156; to Naeser, No. 1,414,147; and to Van Leuven, No. 1,655,481, and the British patent to Spencer, No. 8262, to illustrate the reading of the claims on the prior art, as well as the manner of reading the claims on Knox's own disclosure



and the Feather Ride structure. In Appendix I appellant reads Knox claim 1 on the selected patents as typical of the group of claims consisting of claims 1 and 15, and in Appendix II appellant reads Knox claim 2 as typical of the group consisting of claims 2, 11 and 17. If the Court desires, appellant will read all the claims in the manner of either claim 1 or claim 2.

If appellee objects that the car trucks of Jeffries and Spencer are different from the six wheel attachment for motor vehicles of the Knox patent, let it be reminded that the trailer of defendant's structure, which is neither a six wheel attachment nor a *motor* vehicle, is likewise different from the six wheel attachment of Knox for a motor vehicle, and more nearly resembles Spencer's car truck than it does Knox's attachment.

If the appellee objects that the vehicle chassis of Naeser is not a six wheel attachment, let it be reminded that neither is Feather Ride a six wheel attachment, but a four wheel semi-trailer which more nearly corresponds to the showing of Naeser than it does to the six wheel attachment of Knox. The fact that these structures are different from the Knox six wheel attachment should make it all the more difficult to read the claims thereon. The fact that the claims can be read on bogey car trucks either confirms all the more appellant's contention as to their undue breadth and invalidity, or establishes that there is not so much difference between the railroad bogey art and the six-wheel attachment art as appellee would have us believe, or both.

Before proceeding with a reading of the claims, appellant asks the Court to bear in mind that if and when the claims can be so readily read upon the prior art, they are invalid under the undisputed rules of law:

(1) That the claims measure the invention, and that a finding of infringement must be predicated on a finding of violation of the claims either in their express terms or with such latitude of interpretation and amplification as is permitted by the doctrine of equivalents;

(2) That a claim which reads upon the prior art encompasses more than the patentee may claim as his invention;

(3) That an alleged invention which is not defined (by claims) in terms so as to avoid reading upon the prior art is anticipated by such prior art and cannot properly be granted the protection of U. S. Letters Patent; and

(4) That the same restrictions of interpretation placed upon claims to save them from reading on the prior art must also be placed upon the claims when reading them on the alleged infringing device.

Inasmuch as comparison of the manner of reading of the claims on the different structures is facilitated by arranging the readings in adjacent columns, appellant has prepared the reading of claim 1 in Appendix I, and the reading of claim 2 in Appendix II. Reference is made thereto.

Appellant asks the Court to point out wherein he is in error, either in law or in fact. Appellant asks the

Court to read the claims first on Feather Ride, and then on the prior art, and thus note that the claims read on British patent No. 8262 to Spencer as easily as they read on Feather Ride, and that they read on Jeffries, Pratt, Naeser and Van Leuven easier than they read on Feather Ride. For a comparison of claim 11 with Pratt and Feather Ride, see pages 197-202 of the Transcript of Record.

### **Feather Ride Follows the Prior Art**

The third point stated in the Petition for Rehearing is:

3. That the defendant's activities fall within the scope of the prior art Patents No. 878,156 to Pratt; No. 1,534,458 to Mohl; British Patent No. 8262 to Spencer; and No. 1,655,481 to Van Leuven.

The Court has not passed upon the defense stated on pages 39, 43-47 of Appellant's Brief on Appeal that "Defendant's activities fall within the scope of the prior art." If this be so, there can be no infringement. It is clearly shown therein how defendant's Feather Ride structure and the structures of the patents to Pratt, Spencer and Mohl are substantially identical arrangements of parts. The only differences are in elements which are shown by the record to be equivalents.

It is appellant's contention that the Feather Ride structure follows the teachings of the prior art rather than the teaching of Knox, both as to the arrangement of parts and in using a rubber cushion, as shown by

Fageol 1,692,891, to obtain the necessary flexibility instead of a universal joint. It naturally follows that if defendant's structure is taught by the art prior to Knox, it is not subject to domination by the Knox patent. Appellant asks the Court to rule on this point presented on page 43 of his Brief on Appeal and point out wherein the defense fails.

This point is really a corollary of the first point for consideration on rehearing. By proving that Feather Ride is more similar to the prior art than it is to Knox, it is proved that the claims of Knox, construed so as to read on Feather Ride, read also on the prior art and are therefore invalid.

It has been established in this case that a leaf spring, a pivoted universal joint, and a rubber bushing are all broadly equivalents for the purpose of providing relative universal movement between parts connected by these members. Obviously, however, each such universal connecting means is different from the other, and no doubt each has its advantages and each has its disadvantages. Therefore, specific invention may reside in the specific selection of any one of these universal connecting means. But when speaking of generalities, it is as fair to say that Feather Ride copied from Van Leuven or Spencer as it is to say that Feather Ride copied from Knox.

The Feather Ride structure more nearly resembles and is more closely copied from the railroad bogey art, as exemplified by British Patent No. 8262 to Spencer, than it resembles or is copied from the Knox patent. The Feather Ride structure is the equivalent in all re-

spects of the British patent referred to (Tr. 147). Appellant on pages 44-45 of his Brief on Appeal presented a detailed comparison of Feather Ride with Spencer. It will be seen from the comparison that all the elements of the Feather Ride structure, *and the same arrangement of parts* are found in the British patent to Spencer, and that the Feather Ride structure may more nearly be said to be copied from the British patent to Spencer than it can be said to have been copied from Knox. Is the defendant to be penalized and to be declared an infringer when he appropriates devices and ideas existent in the art, long before Knox, which are presumably free to the public? Or, conversely, is the Knox patent to be allowed to dominate structures made in accordance with the teachings of the prior art? These are the results which will obtain if the opinion of the Honorable Court of Appeals is allowed to stand.

The big difference that exists between the Knox patent and either the defendant's Feather Ride structure or the British patent is that the element designated as a rocker arm in the Knox patent is connected at *an end thereof* with the attachment axle, whereas the walking beam connected to the axle which must be regarded as the attachment axle in either the Feather Ride structure or the British patent has its one end pivotally connected to the frame of the vehicle, has the other end connected to the free end of the rear spring, and has its connection with the attachment axle at the middle portion thereof. Knox does not disclose such a structure, and he is not entitled to construe his claim by the doc-

trine of equivalents to include such a structure, because if he does so then it reads squarely on the British patent. Any objection to the showing in Spencer that it does not provide a radius arm or the control exercised by a radius arm is met by recognition of the fact that the function of a radius arm is supplied by the vertical guide boxes. In fact, the resemblance of the Feather Ride structure to the Spencer patent is emphasized by the fact that the suspension in the Feather Ride structure between the rear beam and the frame is accomplished by means of the trunnion and guide box in the same manner as the vertical guide box in the Spencer car trucks holds the axle in fixed longitudinal relation to the vehicle frame.

### **The Doctrine of Equivalents**

The Fourth and Fifth points set out in Appellant's Petition for Rehearing are:

4. That the Court of Appeals has erred in its application of the doctrine of equivalents to find infringement based upon identity of function, and in its conclusion that identity of structure results from identity of function, without applying the doctrine of equivalents in the same way to compare Knox with the prior art, such as the patents to Pratt 878,156; Stebbins et al, 1,562,265; Van Leuven 1,655,481, Naeser 1,414,147, and British patent to Spencer 8262/1906.

5. That the Court of Appeals erred in applying the doctrine of equivalents to the functions, results and manner of operation of the Knox structure rather than in its proper role of interpretation of the patent claims.



A considerable portion of appellant's argument is common to both points, so the points are herein treated together.

First of all, let it be made clear that appellant has no quarrel with certain propositions and conclusions developed in this case as to equivalents. Appellant agrees that a universal joint, a leaf spring, and a rubber bushing are equivalent elements for providing universal relative movement in varying degree between parts connected by such elements. Appellant agrees that a leaf spring may be the equivalent of a rocker arm. Appellant agrees that the combination of a beam and a nest of coil springs is the equivalent of a leaf spring. Proof of equivalency of particular elements is established from the knowledge of the prior art—not by their comparison for the first time in an alleged infringing device and in the patented device. It has been established in the case at bar that equivalency of the above named elements was known before the time of the Knox patent. Therefore, any equivalency existing between Knox and Feather Ride, so far as these elements are concerned, also exists between Knox and the prior art, and Knox is not entitled to dominate a structure merely because it employs such elements which were already known to be equivalents prior to Knox. The claims of the Knox patent should be restricted in scope to avoid the prior art rather than enlarged by the doctrine of equivalents to include both the defendant's Feather Ride structure and the prior art.

Appellant further points out that proof of the equivalency of the elements named above does not prove

equivalency of the combinations in which they are used. Vice versa, proof of similarity of function and operation of two combinations of elements does not prove equivalency of all the elements in the combination, because the arrangement of elements in the combination may be entirely different, and in patents for mechanical combinations a specific arrangement of parts is itself an element of the combination. Appellant's objection to the opinion in this case is that the doctrine of equivalents has been applied to different combinations of old elements merely because those combinations accomplished the same results, and without regard to the limitations contained in the claims, and also without regard to whether the prior art limited the invention as defined in the claims.

It is well established that a claim for a mechanical structure is not infringed by each competitive device that accomplishes the same result. If this were so, one may as well write claims as "means for accomplishing a stated function". The doctrine of equivalents must proceed from the claimed definition and not from proof as to similarity of operation and function of the devices. It is in this respect that the trial court and the Court of Appeals have fallen into error. The decisions cited by the Court in its opinion, while having verbiage which appear to support the conclusion of the Court, will be found upon analysis to recognize either expressly, or impliedly in view of the merits of each case, that the doctrine of equivalents is at all times to be limited by the prior art.

In the instant case, the Court has found that there was identity of function between the operation of Knox and the Feather Ride structure, and then concluded therefrom, first, that there was identity of structure, and, second, that infringement necessarily results therefrom. It is submitted that such application of the doctrine of equivalents is laid upon too broad a basis, even without regard to the prior art. It is repugnant to logic and fact that identity of operation and identity of function necessarily result in identity of structure. If this were so, all devices which accomplish a given result would infringe all patents which teach a means of obtaining that result. Such reasoning and application of the doctrine of equivalents overlooks entirely the infirmity of, and repugnance attached by the patent law to, claims which define a structure by a statement of its function. For the purpose of such application of the doctrine of equivalents, the claims may as well have been defined in the terms stated in the object of the patent. The landmark case in holding that claims may not be defined in such broad scope as to be nothing more than the statement of objects is *O'Reilly v. Morse*, 56 U.S. (15 How.) 61, 105 et seq. (1853). It will be recalled that that case involved Morse's invention of the telegraph. The Supreme Court held invalid a claim of the patent drawn in the following terms:

"Eighth: I do not propose to limit myself to the specific machinery or parts of machinery described in the foregoing specification and claims; the essence of my invention being the use of the motive power of the electric or galvanic current, which I

call electromagnetism, however developed for marking or printing intelligible characters, signs, or letters, at any distances, being a new application of that power of which I claim to be the first inventor or discoverer."

There was no dispute that the claim as recited defined Morse's invention, but the objection to the claim was that because it was stated in terms of results, rather than apparatus, it defined more than the apparatus which he had invented. Morse's invention, of even such a basic device as the telegraph, was limited to apparatus.

The principle of law that functional claims are improper has been followed by the Supreme Court in numerous cases up to the present time. In *Holland Furniture Company v. Perkins Glue Co.*, 277 U.S. 245 (1928), the Court stated, on page 256:

"But an inventor may not describe a particular starch glue which will perform the function of animal glue and then claim all starch glues which have those functions."

The principle is also followed in *General Electric Co. v. Wabash Appliance Corp*, 304 U.S. 364 (1938); 37 U.S. P.Q. 466, 468, the court stating:

"The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights."

In *Burr v. Duryee*, 68 U.S. (1 Wall.) 531, 581 (1863), the Supreme Court noted how a claim might be expanded or contracted at will on the strength of "pure logic". In discussing the claim which contained the words "substantially as described", the court stated:

"In a contest with the previous patent, the last words can be called in to qualify the first, and narrow it down to the peculiar combination of devices described; while, in assaulting a new combination, for the purpose of suppressing it, the claim may be stretched to cover every machine having a 'concave vibrating surface' by calling all the other parts 'equivalents'."

The situation thus described by the Supreme Court is quite similar to the result being achieved in the instant case.

Other cases barring the functional claim are *Universal Oil Products Co. v. Globe Oil and Refining Co.*, 322 U.S. 471; 61 U.S.P.Q. 382 (1944); and *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1; 67 S. Ct. 6; 71 U.S.P.Q. 175 (1946).

In the latter case, which incidentally reversed the decision of the Ninth Circuit Court of Appeals reported in 146 F. (2d) 817 cited by the Court of Appeals in its opinion in this case, the Supreme Court states:

"Patents on machines which join old and well-known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent's scope beyond what was actually invented, courts have viewed claims to combinations and improvements or additions to them with very

close scrutiny. Cf. *Lincoln Engineering Co. v. Stewart Warner Corp.*, 303 U.S. 545, 549-51 [37 USPQ 1, 3-4]. For the same reason, courts have qualified the scope of what is meant by the equivalent of an ingredient of a combination of old elements. *Gill v. Wells*, 22 Wall. 1, 28, 29. *Fuller v. Yentzler*, 94 U.S. 288, 297, 298. It is quite consistent with this strict interpretation of patents for machines which combine old elements to require clear description in combination claims. This view, clearly expressed in *Gill v. Wells*, *supra*, is that

‘Where the ingredients are all old the invention \* \* \* consists entirely in the combination, and the requirement of the Patent Act that the invention shall be fully and exactly described applies with as much force to such an invention as to any other class, because if not fulfilled all three of the great ends intended to be accomplished by that requirement would be defeated. \* \* \* (1.) That the Government may know what they have granted and what will become public property when the term of the monopoly expires. (2.) That licensed persons desiring to practice the invention may know, during the term, how to make, construct, and use the invention. (3.) That other inventors may know what part of the field of invention is unoccupied.

‘Purposes such as these are of great importance in every case, but the fulfillment of them is never more necessary than when such inquiries arise in respect to a patent for a machine which consists of a combination of old ingredients. Patents of that kind are much more numerous than any other, and consequently it is of the greatest importance that the description of the combination, which is the invention, should be full, clear, concise, and exact.’ *Gill v. Wells*, *supra*, at 25-26.”

\* \* \* \* \*

“Under these circumstances the broadness, ambiguity, and overhanging threat of the functional



claim of Walker become apparent. What he claimed in the court below and what he claims here is that his patent bars anyone from using in an oil well any device heretofore or hereafter invented which combined with the Lehr and Wyatt machine performs the function of clearly and distinctly catching and recording echoes from tubing joints with regularity. Just how many different devices there are of various kinds and characters which would serve to emphasize these echoes, we do not know."

\* \* \* \* \*

"Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent."

The most grievous error on the part of the Court of Appeals in its application of the doctrine of equivalents relates to the matter of comparing the results and operation of the defendant's Feather Ride structure with the disclosure of Knox without also comparing the results and operation of the prior art devices, both with defendant's Feather Ride structure and the disclosure of Knox. The finding of the Court that because the elements of the defendant's structure "combine to produce the same results—flexibility, equal distribution of the load, avoidance of excessive wear—which the patent in suit first taught the art." is solely a finding of identity as to function and not as to identity of structure as stated by the Court. Furthermore, *it is not first taught* by Knox.

When the doctrine of equivalents is employed, as in the present case, to base a conclusion of identity of

structure upon a finding of identity of function and operation, it acts as a boomerang, because it is only fair to examine the prior art for identity of structure under the same test of equivalency. The test reaches backwards into the art as well as forwards to an alleged infringement. If Feather Ride is equal to Knox on the ground of successful operation and similarity of function, so is Stebbins et al 1,562,265 or Van Leuven 1,655,481 equal to Knox. By the reasoning applied by plaintiff and the Court, to-wit, that if the same results are obtained—flexibility, equal distribution of the load, avoidance of excessive wear—then there is identity of structure on the ground of equivalency—by this same reasoning, it must be found that there is identity of structure between the Knox patent and the Stebbins et al patent 1,562,265, because that is an operative device employed by the Utility Trailer Co. even at the present time for the manufacture of six wheel trailers according to the testimony of Mr. Knox (Tr. 105-106). It follows then that the Knox patent is anticipated by Stebbins et al patent to the same extent and for the same reasons that Knox is infringed by the Feather Ride structure.

Similarly, Van Leuven No. 1,655,481 can be shown to be the equivalent of Knox. Appellee, on page 36 of its brief, asserts that the Van Leuven patent is a rigid type structure. Such assertion is in conflict with Van Leuven's own description, prepared by his patent attorneys, Lyon & Lyon, who were the attorneys for the Knox patent and are the attorneys for plaintiff-appellee.

Van Leuven's claim 11 specifies in the final clause "the springs (29) being mounted for independent equalization on opposite sides of the frame." In claims 10 and 12, these springs of the attachment are referred to as "levers" in similar clauses: "said levers being mounted for independent equalization on opposite sides of the vehicle." This "independent equalization" obviously refers to the "up and down motion of the auxiliary wheels 43" referred to on page 3, line 72. Thus the concept of independent equalization of the levers or rocker arms on opposite sides of the frame to maintain the auxiliary wheels in engagement with an irregular surface roadway is a common inventive concept in both Van Leuven and Knox patents, but the record shows that Van Leuven is prior to Knox.

Feather Ride follows the teaching of Van Leuven, not Knox, in using a cushion or spring element to obtain the necessary flexibility, instead of a universal joint. Let Knox be restricted to a double pivot universal joint which he shows, and not be interpreted to cover the resilient element type of universal taught by Van Leuven. Van Leuven has expired and should be available for free public use.

See also on page 1 of the patent to Naeser (Tr. 525), the very fine statement of operation and the description of the means provided for obtaining relative universal movement of each of the wheels independently of the others, and of the universal connecting means for connecting the wheel to the axle. Both Van Leuven and Naeser must therefore be the equivalents of Knox. Be-

ing prior to Knox, Knox is invalid unless restricted to his specific disclosure. Being prior to Knox, they are in the public domain and defendant's structure which operates to accomplish the same results as Van Leuven or Naeser is free from domination by Knox.

In view of the foregoing exposition, it is believed that it is now clear that the doctrine of equivalents should be applied only in consideration of the structures defined in the claims—not to similarities of function and theories of operation. Even if we were to consider the Knox invention to be as defined by the District Court in Finding 7 then we do not find in the defendant's alleged infringing structure an essential element of the combination, namely: "which rocker arms are connected at their opposed ends through the provision of the universal joint with one of said axles". The term "opposed ends" used in Finding 7 is not used in the patent, but it must refer, in the light of the context of Finding 7, to the ends of the rocker arms which are not connected with the vehicle spring. This, then, makes it necessary that we consider the front beam of Feather Ride as the rocker arm, for otherwise, if the rear beam were considered to be the rocker arm, neither of its ends is connected to the vehicle spring. By no fair reading of the definition of the invention contained in Finding 7 can it be said that the opposed ends of the rocker arms in defendants' Feather Ride structure are connected through the provision of a universal joint with one of said axles. Nor can we find an element in the defendant's structure which is equivalent to this very essential

element of plaintiff's patent. Neither of the opposed ends of the front walking beams in defendant's Feather Ride structure is connected, with or without a universal joint, to one of said axles. It is true that both of defendant's Feather Ride walking beams are connected to each of the two axles through a rubber cushion, *but not at their "opposed ends"* as the term has been defined.

It was necessary to include in the definition of the Knox invention the language "which rocker arms are connected at their opposed ends through the provision of the universal joint with one of said axles" in order to define the essence of the new combination invented by Knox and to distinguish from the prior art. As shown in the readings of the claims, Jeffries, Pratt, Naeser, Van Leuven, and Spencer each have a rocker arm connected to one axle respectively of the device through the provision of a universal joint (or its equivalent). It is only by a strict reading of the limitation quoted above that the Knox patent avoids reading on the prior art.

Appellant returns to *one proposition which is fundamental in a fair decision of this case, and that is that the claims should be read upon the defendant's Feather Ride structure in order to establish infringement. But the claims have not yet been so read either by the District Court or the Court of Appeals.* On the contrary, the reading of the claims has been overlooked under the erroneous reasoning that since the operation of the devices is similar or identical, there must be infringement.

Appellant respectfully repeats that it is the claims which measure the invention, and that the proper application of the doctrine of equivalents is only for the purpose of broadening the scope of a particular term or element in a claim to include an equivalent term or element. The doctrine of equivalents should not be applied to the combination defined in the claim as a whole, which is what is being done in the present case.

The Knox invention is for a combination, and should be limited to that combination and not extended to all combinations which produce the result, unless that result and the structure required to accomplish that result can be defined in terms which exclude the prior art. Appellant's device more closely resembles the prior art than it does the Knox patent, so that when Knox attempts to enlarge his scope to include the appellant's structure, he necessarily encroaches upon the prior art. The Knox claims must therefore not only be read upon the defendant's structure in order to establish infringement, but also be found not to read, construed in the same manner upon the prior art. The claims must likewise be read in terms of the structural elements defined therein and not in reference to the functions described in the Knox specification or by plaintiff's attorneys. This is a case involving a machine having definite structures and defined in structural terms. Function may be looked to only to determine whether a particular element may be substituted for another, and not as to whether one arrangement of all the elements may be substituted for another arrangement.



## Paper Nature of the Prior Art

The sixth point stated in the Petition for Rehearing is:

6. That the Court has mistakenly considered the prior art to be "paper" art and has failed to accord due weight to the prior art under the erroneous belief that if it were impractical, it was not competent or operative.

The question to be resolved is as to whether the art cited by defendant-appellant and compared with the Knox claims, as above, is proper to be considered and entitled to any weight. Otherwise, the Court may linger upon the impression that the patents relied upon by appellant are improper references, even for disclosing the subject matter defined by the Knox claims.

The appellee has attempted to discredit the patents introduced by defendant as evidence of prior art by claiming that they were impractical or merely "paper" art. The Court has apparently been influenced by the appellee, as evidenced by the statement on page 13 of the opinion that: "The art, it should be observed, is chiefly 'paper' art."

Defendant's witness, Dr. Clark, read the claims of Knox on British patent to Spencer, No. 8262 (Tr. 166-171); on the patent to Smith 1,111,924 (Tr. 172-173); on the patent to Collard, 1,131,118 (Tr. 173-175); on the patent to McCracken 1,527,987 (Tr. 175-176); on the patent to Mohl 1,534,458 (Tr. 176-177, 210-211); on the patent to Jeffries No. 174,533 (Tr. 193-194); on the

patent to Pratt, No. 878,156 in comparison with a reading on the Feather Ride structure (Tr. 197-202); on the patent to Brillie, No. 915,733 (Tr. 202-206); on the patent to Furlong 1,436,031 (Tr. 208-210); on the patent to Van Leuven 1,655,481 (Tr. 214-215); and on the patent to Fageol 1,692,891 construed in the same manner as construed to read on Feather Ride (Tr. 215-217). None of these patents were admitted or proved to be impractical.

Appellant pointed out at the top of page 12 and at the bottom of pages 13-14 of his Reply Brief that the Stebbins and Van Leuven Patent No. 1,562,265 (Exhibit No. 52—Tr. 542) was a successful, operating structure. This patent has been extensively exploited by the Utility Trailer Manufacturing Company throughout its life, and, after the discontinuance of manufacture in accordance with the Knox patent in 1928 or thereabouts, trailers manufactured by the Utility Trailer Manufacturing Company have corresponded more to the Stebbins and Van Leuven Patent No. 1,562,265 than they did to the Knox patent, according to Mr. Knox's testimony (Tr. 105-106). Patent 1,562,265 is, therefore, not a paper patent.

Appellant pointed out on pages 12 and 13 of his Reply Brief that the Van Leuven Patent No. 1,655,481 (Exhibit 56—Tr. 547) was a successful, operating structure. Further evidence of the successful commercial application of this patent is shown by plaintiff's Exhibit No. 77 (Tr. 447-448). It will appear therefrom that the District Court for the Southern District of California,

in Civil Action No. 1650-Y, Six Wheel Corporation and Erna Agnes Van Leuven v. Fager Corporation and J. M. Hellen, entered a judgment decreeing that Letters Patent No. 1,655,481, together with the Knox patent in suit, and each and every claim thereof, were good and valid in law and had been infringed by the Fager corporation and J. M. Hellen jointly. Patent No. 1,655,481 must have defined a practicable and commercially successful structure, or it would not have been infringed, and the plaintiff in that case, who is the same plaintiff in this case, would not have needed to be concerned if others were manufacturing only impractical devices under the patent. Appellant submits that plaintiff's Exhibit No. 77 is evidence of practical use of Van Leuven Patent No. 1,655,481, and that such patent may not, therefore, be dismissed by the appellee and the Court as impractical or a "paper" patent.

Furthermore, the law is clear as appellant has shown on pages 10 and 11 of his Reply Brief that United States patents, whether actually reduced to practice or not, and whether impractical or not, are competent, even if inoperative, to be considered as prior art for the inventive concepts and structures shown therein. Actually, appellee's implication that the prior art references are inoperable is without evidentiary support. The most adverse statement about any of the references is that they may have been impractical (Tr. 252, 253, 254). No criticism was made of the patent to Jeffries 174,533, the patent to Pratt, 878,156, the patent to Naeser 1,414,147, the patent to Stebbins et al 1,562,265, the patent to Van

Leuven 1,655,481; British patent to Spencer 8262. On the other hand, the fact of patenting of the prior art references is evidence of their operativeness. Metropolitan Engineering Co. v. Coe, 64 App. D.C. 315; 78 F. (2d) 199; 25 U.S.P.Q. 216.

In conclusion, appellant asks one chief consideration—that the Court read the claims of the Knox patent, first on Feather Ride, and then on the prior art, and point out to appellant wherein the claims do not read on the prior art in the same manner that they read on Feather Ride. Only then can it be said that the claims are valid and infringed.

Respectfully submitted,

HAROLD L. COOK,

LEE R. SCHERMERHORN,

Attorneys for Appellant.

No. 12147

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United States  
Court of Appeals  
for the Ninth Circuit

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SECURITY-FIRST NATIONAL BANK OF LOS  
ANGELES, a national banking association,  
Appellant,

vs.

FRANCIS F. QUITTNER, as Trustee in Bank-  
ruptcy of the Estate of Alvera Gordon Jones,  
doing business as LeRoy Gordon Beauty Salons,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Southern District of California  
Central Division

FEB 19 1949

PAUL R. O'BRIEN,  
CLERK





No. 12147

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United States  
Court of Appeals  
for the Ninth Circuit

---

SECURITY-FIRST NATIONAL BANK OF LOS  
ANGELES, a national banking association,  
Appellant,

vs.

FRANCIS F. QUITTNER, as Trustee in Bank-  
ruptcy of the Estate of Alvera Gordon Jones,  
doing business as LeRoy Gordon Beauty Salons,  
Appellee.

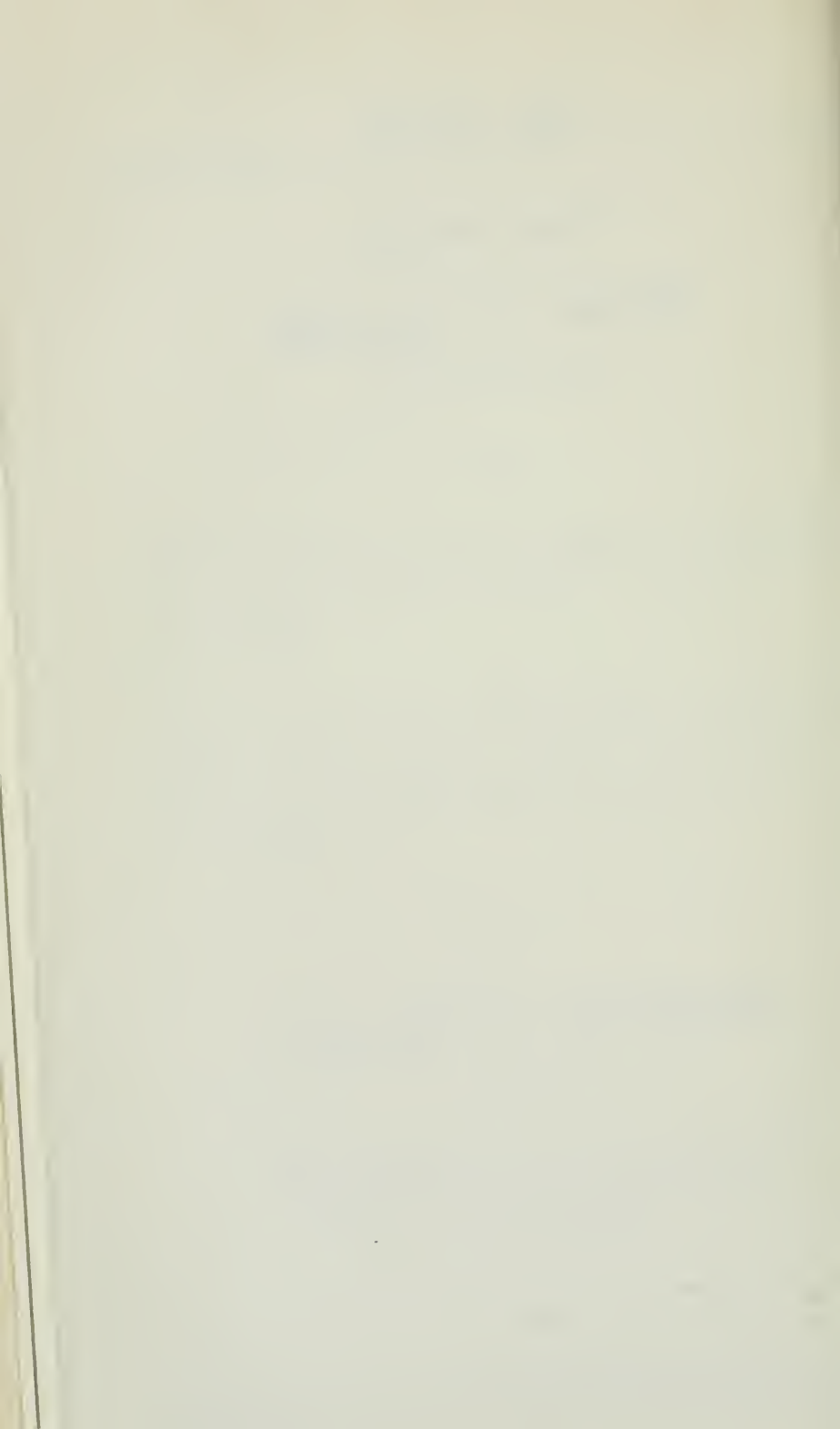
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Transcript of Record

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Appeal from the United States District Court  
for the Southern District of California  
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

IRWIN R. BUCHALTER,  
RICHARD L. MOSS,  
121 5 Bankers Bldg.,  
629 S. Hill St.,  
Los Angeles 14, Calif. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 8437-PH

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the Estate of ALVERA GORDON JONES, Doing Business as LEROY GORDON BEAUTY SALONS,

Plaintiff,

vs.

SECURITY FIRST NATIONAL BANK OF LOS ANGELES, a California Banking Corporation,  
Defendant.

# COMPLAINT TO RECOVER PREFERENCE

Plaintiff complains of the defendant and alleges:

## I.

That this action arises under the Act of Congress relating to bankruptcy as hereinafter more fully appears; that on the 5th day of March, 1948, an involuntary petition in bankruptcy was filed in this Court against Alvera Gordon Jones, doing business as Leroy Gordon Beauty Salons, hereinafter called the bankrupt, upon which an adjudication of bankruptcy was duly entered herein; that thereafter the plaintiff was duly appointed the trustee of the Estate of said bankrupt and duly qualified and is still acting as such.

## II.

That the plaintiff brings this suit under the authority of Section 60 of the Bankruptcy Act, for the



purpose of avoiding [2] preferential interests, the particulars of which are hereinafter set forth.

### III.

That prior to the commencement of this action, leave of Court was obtained to institute this action.

### IV.

That heretofore and on or about the 2nd day of December, 1947, the 18th day of December, 1947, the 23rd day of January, 1948, all of said dates being within four months before the filing of said Petition in bankruptcy, the bankrupt paid and transferred to the defendant sums totaling sixteen hundred and fifty dollars (\$1650.00).

### V.

That said payments and transfers were made for and on account of an antecedent debt owed by the bankrupt.

### VI.

That said payments or transfers were made or suffered by the bankrupt while insolvent.

### VII.

That the effect of said payments or transfers was to enable the defendant to obtain a greater percentage of its debt than other creditors of the same class.

### VIII.

That at the time of the transfers or payments of the defendant of the sums hereinbefore mentioned, and at the time of the receipt thereof by the defendant, the defendant had reasonable cause to be-

lieve that the bankrupt was insolvent and that said transfers would effect a preference.

IX.

That prior to the commencement of this action, plaintiff demanded of defendant the return of said sums, which demand has been refused; that the sums which were received by the said [3] defendant by means of the above described transfers constitute property belonging to plaintiff trustee.

Wherefore, plaintiff prays judgment against defendant in the sum of sixteen hundred and fifty dollars (\$1650.00), with interest thereon from the 2nd day of December, 1947, together with his costs herein, and for such other and further relief as the Court may deem proper.

IRWIN R. BUCHALTER &  
RICHARD L. MOSS,

By /s/ IRWIN R. BUCHALTER,  
Attorneys for the Trustee.

(Duly Verified.)

[Endorsed]: Filed July 16, 1948. [4]

---

[Title of District Court and Cause.]

ANSWER

Comes now the Defendant, Security-First National Bank of Los Angeles, a National Banking Association, sued herein as Security First National Bank of Los Angeles, a California banking

corporation, and answering Plaintiff's Complaint herein admits, denies and alleges:

I.

Defendant admits each, every and all of the allegations contained in paragraph I of Plaintiff's Complaint herein; except that Defendant denies that any legal cause of action whatsoever arises in favor of Plaintiff herein and against this Defendant [6] under the Act of Congress relating to bankruptcy, or any other Act of Congress whatsoever, by reason of the matters and things set forth in said Complaint.

II.

Answering paragraph II of Plaintiff's Complaint herein, Defendant denies that Section 60 of the Bankruptcy Act, or any other section of said Bankruptcy Act authorizes any cause of action whatsoever against this Defendant by reason of the matters and things set forth in said Complaint for the purpose of averting preferential interest or otherwise; and further denies that Defendant ever obtained any preferential interest by reason of any matters or things set forth in the Complaint herein.

III.

Defendant admits each, every and all of the allegations of paragraph III of the Complaint herein.

IV.

Defendant admits each, every and all of the allegations contained in paragraph IV of Plaintiff's Complaint herein.

## V.

Defendant admits each, every and all of the allegations contained in paragraph V of Plaintiff's Complaint herein.

## VI.

Defendant has not sufficient knowledge, information or belief to enable it to answer paragraph VI of Plaintiff's Complaint herein, and basing its denial on that ground denies generally and specifically each, every and all of the allegations therein contained.

## VII.

Defendant has not sufficient knowledge, information or belief to enable it to answer paragraph VII of Plaintiff's Complaint [7] herein, and basing its denial on that ground denies, generally and specifically, each, every and all of the allegations therein contained.

## VIII.

Defendant denies generally and specifically each, every and all of the allegations contained in paragraph VIII of Plaintiff's Complaint herein.

## IX.

Defendant denies generally and specifically each, every and all of the allegations contained in paragraph IX of Plaintiff's Complaint herein; except that it admits that prior to the commencement of the above-entitled action Plaintiff demanded of Defendant the sum of Sixteen Hundred Fifty and no/100 Dollars (\$1650.00) and that Defendant refused said demand.

Wherefore, Defendant prays that Plaintiff take nothing by reason of his Complaint herein and that Defendant recover judgment for its costs of suit.

/s/ ROANE THORPE,

Attorney for Defendant.

(Acknowledgment of Service.)

(Duly Verified.)

[Endorsed]: Filed Aug. 11, 1948. [8]

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause, coming on for trial on the 8th day of November, 1948, and having been tried before the Court, the Honorable Charles C. Cavanah, Judge presiding, the Court sitting without a jury, Irwin R. Buchalter and Richard L. Moss, Esqs., appearing as counsel for the plaintiff, and Roane Thorpe, Esq., appearing as counsel for the defendant, and after hearing the allegations and proofs of the parties, the arguments of counsel, and being fully advised in the premises, the following findings of fact and conclusions of law constituting the decision of the Court in said action are hereby made:

### FINDINGS OF FACT

#### I.

That an involuntary petition in bankruptcy was filed in [11] this Court on the 5th day of March,

1948, against Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, hereinafter called the bankrupt, upon which an adjudication was duly entered herein.

## II.

That thereafter the plaintiff, Francis F. Quittner, was duly appointed the trustee of the estate of said bankrupt, and duly qualified and is now acting as such trustee.

## III.

That prior to the commencement of this action, the plaintiff obtained leave of Court to institute this action.

## IV.

That on or about the 2nd day of December, 1947, the 18th day of December, 1947, and the 23rd day of January, 1948, the bankrupt paid and transferred to the defendant, Security First National Bank of Los Angeles, property consisting of sums of money totaling Sixteen Hundred and Fifty Dollars (\$1650.00).

## V.

That said Sixteen Hundred and Fifty Dollars (\$1650.00) was paid or transferred by said bankrupt to said defendant within four months before the filing of said petition in bankruptcy on the 5th day of March, 1948.

## VI.

That said payments or transfers were made to said defendant for and on account of a debt owed by the bankrupt to said defendant; to wit, a loan made by the defendant to the bankrupt on or about



the 6th day of January, 1947, said loan being evidenced by a promissory note.

#### VII.

That said payments or transfers were made by the bankrupt to said defendant in full and complete payment of her indebtedness to said defendant. [12]

#### VIII.

That other creditors of the bankrupt, of the same class as said defendant, did not receive payment of their claims.

#### IX.

That prior to and at the time of the payments or transfers, said defendant was in possession of such facts concerning the bankrupt's business as would give it reasonable cause to believe that the said bankrupt was insolvent.

#### X.

That at the time said payments or transfers were made or suffered by the bankrupt, the fair valuation of the aggregate of her property was not sufficient in amount to pay her debts.

#### XI.

That prior to the commencement of this action, the plaintiff demanded of defendant the return of said sum of Sixteen<sup>00</sup> Hundred and Fifty Dollars (\$1650.00) and that said demand was refused by said defendant.

#### XII.

That each and all of the denials and allegations set forth in defendant's answer to plaintiff's complaint herein which are inconsistent with the findings of fact herein are untrue.

From the foregoing Findings of Fact the Court makes the following:

## CONCLUSIONS OF LAW

### I.

That the payments or transfers made by Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons to the defendant, Security First National Bank, of her property consisting of sums of money totaling Sixteen Hundred Fifty Dollars (\$1650.00), was a transfer of the debtor's property to or for the benefit of the creditor, for or on account of an [13] antecedent debt, made or suffered by such debtor, while insolvent and within four months before the filing against her of the petition in bankruptcy, which payment or transfer constituted a preference within the meaning and scope of Section 60 (a) of the Bankruptcy Statutes of 1938.

### II.

That said defendant, Security First National Bank of Los Angeles, had, at the time of said payments or transfers, reasonable cause to believe that Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, was insolvent.

### III.

That the plaintiff, Francis F. Quittner, trustee in bankruptcy of the estate of Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, is entitled to recovery of the sum of Sixteen Hundred Fifty Dollars (\$1650.00) from the defendant, Security First National Bank of Los Angeles, together with interest thereon at the rate of

seven per cent (7%) per annum from the date of the commencement of this action, to wit, July 16, 1948, until paid; and costs of suit.

That the order of this Court be entered accordingly.

Dated: This 23rd day of November, 1948.

/s/ CHARLES C. CAVANAH,

District Judge of the United  
States.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 23, 1948. [14]

---

In the District Court of the United States, Southern District of California, Central Division

No. 8437-PH

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the Estate of ALVERA GORDON JONES, Doing Business as LEROY GORDON BEAUTY SALONS,

Plaintiff,

vs.

SECURITY FIRST NATIONAL BANK OF LOS ANGELES, a California Banking Corporation,  
Defendant.

### JUDGMENT

This cause came on regularly for trial before the Court, the Honorable Charles C. Cavanah, Judge presiding, the Court sitting without a jury, on the 8th day of November, 1948, Irwin R. Buchalter

and Richard L. Moss, Esqs., appeared as attorneys for the plaintiff and Roane Thorpe, Esq., appeared as attorney for the defendant, and evidence both oral and documentary having been introduced on behalf of the respective parties, and being fully advised in the premises and the Court herein having made its written findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith;

Now, Therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed, as follows: [16]

That the plaintiff, Francis F. Quittner, as trustee in bankruptcy of the estate of Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, do have and recover of the defendant, Security First National Bank of Los Angeles, the sum of Sixteen Hundred and Fifty Dollars (\$1650.00), with interest thereon at the rate of seven per cent (7%) from the date of the commencement of this action, to wit, July 16, 1948, until paid; together with costs of suit in the sum of \$23.20.

Dated this 23rd day of November, 1948.

/s/ CHARLES C. CAVANAH,

District Judge of the United  
States.

Judgment entered Nov. 23, 1948. Docketed Nov. 23, 1948. Book 54, Page 209.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 23, 1948. [17]

Case No. 8437-PH in

Quittner

vs. Sec First Nat Bk La

Pcfs

1

311-8-48 No. 1

IDENTIFICATION

EVIDENCE

Clerk, U. S. District Court, Dist. of Calif.

L. B. Bigg

Deputy Clerk.

ET NO.  
Ledge Sheet  
COMMERCIAL ACCOUNT  
**SECURITY-FIRST NATIONAL  
BANK OF LOS ANGELES**

TRY SALON

ANCE	CHECKS	CHECKS	CHECKS	NEW BALANCE
502700	76.60 -	748.1 -	582.1 -	
	87.18 -	68.45 -	85.56 -	
	58.67 -	80.60 -	95.50 -	
	69.18 -	116.86 -	121.63 -	
1933-	133.74 -	76.96 -	65.11 -	
	81.33 -	92.40 -	144.75 -	
	127.95 -	115.00 -	35.80 -	
	1930 -	45.26 -	72.17 -	
	63.47 -	88.66 -	72.31 -	
	92.96 -	69.67 -	97.02 -	
	119.74 -	69.74 -	98.71 -	
	76.97 -	76.10 -	81.18 -	
				OCT 147 2,319.5
				OCT 247 4,059
582-	1350.15	1250.15	80.00 -	
	40.00 -	96.42 -	87.52 -	
	40.20 -	43.57 -	64.91 -	
	35.80 -	77.59 -	76.60 -	
	64.31 -	89.13 -	107.35 -	
042-	111.20 -			
				OCT 347 5,100.4
545-				
				1,150.60
				454.37
				424.35
				90.16
				OCT 347 3,495.4
				OCT 447 2,980.9
094-	600.15	100.15	83.47 -	
	89.80 -	96.82 -	74.02 -	
570=	124.65 -			
	5.00 -	2.50 -		
				OCT 447 3,456.7
6107-				
6177-				
				128.83
				1,371.30
				OCT 747 1,964.0
				317.30
				OCT 847 1,646.7
2106-	1.50 -	1.50 -		
2386-				
522	32.58 -	15.42 -	41.49 -	
	4.57 -			
	6.56 -			
				522.71
				OCT 947 1,124.06
				338.20
				OCT 1047 788.86
				895.08
				OCT 1147 1062.2
				OCT 1147
				OCT 1147 5.60





PLAINTIFF'S EXHIBIT No. 2

(Admitted in Evidence 11/8/48)

Neilson & Ellis

Accountants & Auditors.

523 West Sixth Street

Los Angeles 14, Calif.

September 8, 1947.

Mrs. Alvera Gordon Jones  
LeRoy Gordon Beauty Salons  
514 No. La Brea Avenue  
Los Angeles 36, California

Dear Mrs. Jones:

In compliance with your request, we have installed a new system of accounting for your 16 Beauty Salons, Warehouse and Main Office. This system went into effect as of July 1, 1947. The installation of this new system will disclose for you the operating results of each store. It is our recommendation that monthly operating statements be prepared, also a Statement of Assets & Liabilities.

The books and records kept prior to this date were brought into balance as of June 30, 1947. A Trial Balance had been developed by the ex-office manager, Mr. Edward Ellis, as of April 30, 1947. We did not make an audit of the records prior to April, 1947. Accounts for May, June, July and August have been recorded by us or by persons under our supervision.

The Income and Expense accounts appear to be reasonably consistent since your taking over these stores as of July 1, 1946.

We have reconciled the Bank Statement on the

individual stores as of July 31, 1947. As of August 31st the amount totalled \$70.83. These funds are left in the 16 separate banks to cover miscellaneous bank charges, etc.

The Petty Cash Fund is shown in the amount actually counted.

The Merchandise & Supply Inventory was taken by the manager and one assistant at each store, each signing for the accuracy of the count. A letter of instruction had been sent to each manager giving adequate and complete instructions on taking the inventories. A copy of this letter is enclosed for noting. Also enclosed is a summary of inventory amounts by stores which reflect a consistent amount in the various locations. There were two exceptions—where the manager only, signed. The warehouse inventory was taken by the warehouseman and one assistant. Pricing and extension was done in the Main Office by your employees. We test checked these prices and extensions to the extent we deemed appropriate and found them in order.

Furniture & Fixtures values and their respective depreciation reserve have been taken from the books.

Leaseholds, Leasehold Improvements and their respective reserves were set up by the writers.

The Deposit for Compensation Insurance was determined by reference to the policies on hand.

Prepaid Rents were supported by a subsidiary ledger on this subject. We saw no reason to doubt its accuracy.

Prepaid Insurance was set up by the writers based upon information obtained from the policies on hand. [20]

Prepaid Dues & Subscriptions cover magazines, the liability for which has been set up. These subscriptions run into the future for one, two and three years.

The account of "Suspense—Employees & Ex-employees" represents charges for cash paid out, the disposition of which you are to determine as soon as practicable.

The Bank Account for the Main Office has been reconciled as of August 31, 1947, reflecting an overdraft of \$3,217.52.

The Notes Payable is due the Security First National Bank at Highland and Melrose Avenue, Hollywood.

An extensive effort has been made to determine the extent of the liability of Accounts Payable. All bills found have been recorded and are reflected in the statements. We are advised that adjustments are due on some of these payables in the approximate amount of \$1,100.00. These cover such claims as returned merchandise, etc. From a conservative standpoint, we have not effected such adjustments on the records until documentary evidence is furnished to support the reduction of the liability. A schedule of Accounts Payable is enclosed.

The Contracts Payable cover amounts due as follows:

Hazel Dilworth—balance due on purchase of location in Ontario.	\$2,000.00
Hall Co.—Insurance Policies....	879.00
<hr/>	
Total .....	\$2,879.40

As of August 31, 1947, there were Accrued Salaries due for one week, namely, 8-26-47 to 8-31-47. The liability has been set up on an estimated basis—using  $\frac{1}{4}$  of the four preceding week's actual salary costs.

The following Tax Accounts represent the liability due as reflected by the records:

Accrued — State Unemployment Insurance .....	\$1,010.67
Social Security Tax.....	545.96
Payroll Excise Tax.....	354.12
Cosmetics Excise Tax.....	55.62
Sales Tax.....	24.71
Withholding Tax.....	3,299.85

The Statement of Income & Expense shows an operating profit of \$6,118.21. As previously stated, a detailed audit of the accounts was not made prior to May, 1947. The Profit thus developed represents results as reflected by the books and records and the consideration of the Balance Sheets items as determined on August 31, 1947.

We appreciate the opportunity of being of service to you.

Yours very truly,

NEILSON & ELLIS,  
By AUSTIN H. ELLIS,  
Partner. [21]

LeRoy Gordon Beauty Salons

## MERCHANDISE & SUPPLIES INVENTORY

August 31, 1947

	Merchandise		Supplies	Total
Store No. 1.....	149.32	799.62		948.94
Store No. 2.....	152.04	1,081.42		1,233.46
Store No. 3.....	103.30	735.41		838.71
Store No. 4.....	412.64	334.30		746.94
Store No. 5.....	61.73	750.92		812.65
Store No. 6.....	336.09	433.67		769.76
Store No. 7.....	762.57	564.01		1,326.58
Store No. 8.....	637.50	848.44		1,485.94
Store No. 9.....	127.61	551.64		679.25
Store No. 10.....	166.04	642.63		808.67
Store No. 11.....	121.91	615.64		737.55
Store No. 12.....	627.99	450.06		1,078.05
Store No. 13.....	191.55	752.59		944.14
Store No. 14.....	309.30	724.06		1,033.36
Store No. 15.....	143.34	609.13		752.47
Store No. 16.....	281.61	885.74		1,167.35
	<hr/>	<hr/>		<hr/>
	4,584.54	10,779.28		15,363.82
Warehouse .....	2,333.73	13,589.53		15,923.26
	<hr/>	<hr/>		<hr/>
	6,918.27	24,368.81		31,287.08

## LEROY GORDON BEAUTY SALONS

STATEMENT OF ASSETS AND LIABILITIES  
AS OF AUGUST 31, 1947

## ASSETS

## Current:

Change Fund at Stores.....	\$	115.00	
Cash in Branch Banks.....		70.83	
Petty Cash Fund .....		1.82	
Inventory—Merchandise ....	\$	6,918.27	
Supplies .....	24,368.81	31,287.08	\$31,474.73

## Fixed:

Furniture and Fixtures.....	\$16,721.03		
Less Depreciation Reserve	2,600.90	\$14,120.13	
Leaseholds .....	\$ 5,675.00		
Less Reserve Leasehold			
Amortization .....	515.92	5,159.08	
Leasehold Improvements ....	\$ 2,583.54		
Less Depr. Res. Leasehold			
Improvements .....	129.18	2,454.36	
Deposits—Utilities .....		32.50	
Compensation Insurance .....		200.00	21,966.07

## Deferred Charges:

Prepaid Rent .....	\$ 1,840.00		
Prepaid Insurance .....	1,076.67		
Prepaid Dues and Subscriptions.....	449.00	3,365.67	

## Other Assets:

Suspense—Employees and Ex-employees Accounts.....	2,223.75		
---	----------	--	--

Total Assets.....\$59,030.22



## LIABILITIES

## Current:

Bank Overdraft .....	\$ 3,217.52
Notes Payable—Bank .....	2,000.00
Accounts Payable .....	22,805.18
Contracts Payable .....	2,879.40
Accrued Salaries—Estimated .....	3,386.84
Accrued State Unemployment Ins.....	1,010.67
Accrued Social Security Tax.....	545.96
Accrued Payroll Excise Tax.....	354.12
Accrued Cosmetic Excise Tax.....	55.62
Accrued Sales Tax .....	24.71
Accrued Withholding Tax .....	3,299.85

---

Total Liabilities.....\$39,579.87

## Capital:

Alvera Gordon Jones 1-1-47.....	\$12,565.68
1947 Contributions .....	4,500.00
Earnings 1-1-47 thru 8-31-47.....	6,118.31

---

\$23,183.99

Less Drawings .....

---

3,733.64

---

Balance 8-31-47 .....\$19,450.35

---

Total Liabilities and Net Worth.....\$59,030.22

See comments in accompanying letter.

## LeRoy Gordon Beauty Salons

## STATEMENT OF INCOME &amp; EXPENSE

Period January 1 Thru August 31, 1947

Sales .....		181,210.83
Less Cost of Merchandise & Supplies sold and con- sumed:		
Inventory 1-1-47.....	12,780.47	
Purchases .....	19,410.35	
	<hr/>	
	32,190.82	
Inventory 8-31-47.....	31,287.08	903.74
	<hr/>	<hr/>
Balance		180,307.09
Expenses:		
Advertising .....	8,398.29	
Auto Expense.....	297.36	
Depreciation .....	1,681.38	
Donations .....	68.00	
Freight In.....	90.45	
Insurance .....	920.52	
Interest .....	59.00	
Laundry .....	2,913.79	
Leasehold Amortization...	515.92	
Miscellaneous Expense....	4,000.81	
Over-short Cash.....	4.23	
Payroll Taxes.....	4,725.98	
Printing & Office Supplies.	602.70	
Professional Services.....	364.50	

Rent .....	20,282.59	
Repairs & Maintenance...	2,832.71	
Salaries .....	120,287.24	
Shipping .....	1,029.84	
Supplies .....	248.10	
Taxes .....	598.36	
Telephone .....	1,564.96	
Theft .....	20.75	
Travelling .....	1,304.06	
Union Dues.....	37.50	
Utilities .....	3,173.30	
	<hr/>	
Total Expenses.....		176,022.34
		<hr/>
Balance		4,284.75
Add Other Income:		
Rents Collected.....	1,712.00	
Miscellaneous Income.....	121.56	1,833.56
	<hr/>	<hr/>
Net Profit .....		6,118.31*
		<hr/>

\*See Comments in Accompanying Letter.

## SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor in Schedules A and B)

Sched. A-1—a	Wages .....	\$	0.00
Sched. A-1—b (1)	Taxes due United States.....		10,568.98
Sched. A-1—b (2)	Taxes due State of California.....		3,209.13
Sched. A-1—b (3)	Taxes due counties, districts and municipalities .....		0.00

Sched. A-1—c (1)	Debts due any person, including the United States, having priority by laws of the United States.....	0.00
Sched. A-1—c (2)	Rent having priority—See Assignee's Report .....	0.00
Sched. A-2	Secured claims .....	0.00
Sched. A-3	Unsecured claims .....	22,664.25
Sched. A-4	Notes and bills which ought to be paid by other parties thereto.....	2,000.00
Sched. A-5	Accommodation paper .....	0.00
Schedule A, total.....		\$38,442.36
Sched. B-1	Real estate .....	\$ 6,691.86
Sched. B-2—a	Cash on hand .....	0.00
Sched. B-2—b	Negotiable and non-negotiable instruments and securities .....	0.00
Sched. B-2—c	Stocks in trade—See Assignee's Report .....	0.00
Sched. B-2—d	Household goods .....	1,500.00
Sched. B-2—e	Books, prints and pictures.....	0.00
Sched. B-2—f	Horses, cows and other animals.....	0.00
Sched. B-2—g	Automobiles and other vehicles.....	1,000.00
Sched. B-2—h	Farming stock and implements.....	0.00
Sched. B-2—i	Shipping and shares in vessels.....	0.00
Sched. B-2—j	Machinery, fixtures and tools.....	0.00
Sched. B-2—k	Patents, copyrights, and trade-marks.....	0.00
Sched. B-2—l	Other personal property .....	0.00
Sched. B-3—a	Debts due on open accounts.....	0.00
Sched. B-3—b	Policies of insurance .....	275.00
Sched. B-3—c	Unliquidated claims .....	0.00
Sched. B-3—d	Deposits of money in banks and elsewhere .....	7.67
Sched. B-4	Property in reversion, remainder, expectancy or trust, etc.....	0.00
Sched. B-5	Property claimed as exempt (\$9,106.80)	
Sched. B-6	Books, deeds and papers .....	0.00
Schedule B, total.....		\$ 9,474.47

/s/ ALVERA GORDON JONES,  
Petitioner.

[Title of District Court and Cause.]

APPOINTMENT, OATH AND REPORT OF  
APPRAISERS

It is ordered that John O'B. Bodkin of Los Angeles and a disinterested person be, and he is hereby appointed appraiser at a compensation not to exceed \$12.50 per day, to appraise the real and personal property belonging to the estate of the said Bankrupt set out in the schedules now on file in this Court, and report his appraisal to the Court, said appraisals to be made as soon as may be, and the appraiser be duly sworn.

Witness my hand this 18th day of March, A.D. 1948.

/s/ [Illegible.]

Referee in Bankruptcy.

Southern District of California—ss:

Personally appeared the within named Appraiser and made oath that he will fully and fairly appraise the aforesaid real and personal property according to his best skill and judgment.

/s/ JOHN O'B. BODKIN,  
Appraiser.

Subscribed and sworn to before me this 18th day of March, A.D. 1948.

[Seal]

/s/ FLORENCE ROBINSON,  
Notary Public. [26]

I, the undersigned, having been notified that I was appointed to estimate and appraise the real personal property aforesaid, have attended to the duties assigned me, and after strict examination and careful inquiry we do estimate and appraise the same as follows:

Beauty shops located at:

117 West Fifth Street, Long Beach, California.....	\$ 685.00
413 Santa Monica Blvd., Santa Monica, California.....	800.00
1729 Nineteenth Street, Bakersfield, California.....	400.00
62 South Los Robles, Pasadena, California.....	1,000.00
720 Fourth Street, Santa Rosa, California.....	550.00
206 Fulton-Fresno Bldg., Fresno, California .....	400.00
6 North Garfield, Alhambra, California .....	485.00
953 West Manchester, Los Angeles, California.....	600.00
5441 Crenshaw Blvd., Los Angeles, California.....	625.00

Inventory in warehouse located at 514 North La Brea Ave., Los Angeles, Cal.:

\$7,022.25 .....	\$ 3,700.00
Beverly Hills Shop—Equipment and Supplies at 514 No. La Brae .....	685.00

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Total.....\$ 9,930.00

6 days J. O'B. B. Auto Expense—142 miles.

In Witness whereof, I hereunto set my hand at Los Angeles, California, this 27th day of March, A.D. 1948.

/s/ JOHN O'B. BODKIN,  
Appraiser.

[Endorsed]: Filed March 27, 1948. [27]



[Title of District Court and Cause.]

### ORDER CONFIRMING SALE

The Receiver herein, Francis F. Quittner, having filed his duly verified Return of Sale wherein it appears that under and pursuant to an Order of Sale of the Court herein he sold all right, title and interest of the bankrupt estate in and to the following described property, to wit:

Beauty parlors at the following locations:

117 West Fifth Street, Long Beach, California.

413 Santa Monica Blvd., Santa Monica, California.

1729 Nineteenth Street, Bakersfield, California.

62 South Los Robles, Pasadena, California.

720 Fourth Street, Santa Rosa, California.

206 Fulton-Fresno Building, Fresno, California.

6 North Garfield, Alhambra, California.

953 West Manchester, Los Angeles, California.

5441 Crenshaw Blvd., Los Angeles, California.

subject to the terms and conditions of occupancy as announced at the time of sale.

Inventory of merchandise and fixtures at 514 North La Brea Avenue, Los Angeles, California, including inventory of Beverly Hills shop which was moved into the warehouse.

Equity in Remington Rand 11" typewriter, number J-1084757, subject to balance due in the sum of \$112.26 in favor of Remington Rand, Inc., 41 First Street, San Francisco, California. [29]

To Michael M. Weisz for the sum of \$5100.00, and it further appearing that said purchaser was the highest and best bidder for said property, and

that said sum was the highest and best bid received therefor, and that the same constitutes the fair value thereof, and it also appearing satisfactorily to the Court that it is to the best interests of said estate that said sale be confirmed, now, therefore, no adverse interests appearing:

It Is Ordered that the Receiver's sale hereinabove mentioned be, and the same is hereby confirmed, and said Receiver is hereby authorized and directed to deliver over said property to said purchaser upon receipt of the purchase price thereof.

Dated: This 1st day of April, 1948.

/s/ [Illegible.]

Referee in Bankruptcy.

[Endorsed]: Filed April 1, 1948. [28]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Security-First National Bank of Los Angeles, a National Banking Association, Defendant in the above-entitled action, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment, and the whole thereof, entered in this action in Civil Order Book No. 54, Page 209, on the 23rd day of November, 1948, in favor of Plaintiff herein and against Defendant herein.

Dated: December 2, 1948.

ROANE THORPE,

Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 2, 1948. [30]

[Title of District Court and Cause.]

NOTICE DESIGNATING EVIDENCE AND  
RECORDS TO BE CONTAINED IN REC-  
ORD ON APPEAL

Notice Is Hereby Given by Defendant and Appellant herein, Security-First National Bank of Los Angeles, a National Banking Association, that it does hereby designate the following evidence and records in the above-entitled action to be contained and included in the record on appeal herein:

1. Complaint.
2. Answer.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Complete transcript of the oral evidence, but [31] not including the arguments of counsel at end of trial.
6. Complete transcript of Plaintiff's Exhibit No. 2.

Dated: December 2, 1948.

ROANE THORPE,

Attorney for Defendant and  
Appellant.

[Acknowledgment of Service.)

[Endorsed]: Filed Dec. 2, 1948. [32]

[Title of District Court and Cause.]

NOTICE DESIGNATING EVIDENCE AND  
RECORDS TO BE CONTAINED IN REC-  
ORD ON APPEAL

Notice Is Hereby Given by plaintiff and respondent herein, Francis F. Quittner, that he hereby requests that the following evidence and records in the above-entitled action be contained and included in the record on appeal herein:

1. Complete transcript of plaintiff's Exhibit No. 1.

2. Complete transcripts of the following documents contained in the bankruptcy file No. 45,-769-W and entitled, In the Matter of Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, bankrupt.

(a) Summary of debts and assets of the bankrupt.

(b) Order confirming sale of bankrupt's assets.

(c) Appointment and oath of appraiser. [34]

(d) Report of appraiser, John O. Bodkin.

Dated: December 7th, 1948.

IRWIN R. BUCHALTER and  
RICHARD L. MOSS,

By /s/ RICHARD L. MOSS.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 8, 1948. [35]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 36, inclusive, contain full, true and correct copies of Complaint to Recover Preference; Answer; Findings of Fact and Conclusions of Law; Judgment; Plaintiff's Exhibits Nos. 1 and 2; Summary of Debts and Assets, Appointment, Oath and Report of Appraisers and Order Confirming Sale in Bankruptcy Case No. 45769-W; Notice of Appeal; and Appellant's and Appellee's Designations of Record on Appeal which, together with one volume of reporter's transcript of proceedings on November 8, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$9.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 7th day of January, A.D. 1949.

[Seal]

EDMUND L. SMITH,  
Clerk.

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In the District Court of the United States in and  
for the Southern District of California, Central  
Division

Honorable Charles C. Cavanah, judge presiding.

No. 8437-PH

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the Estate of Alvera Gordon Jones, Doing Business as LeRoy Gordon Beauty Salons,

Plaintiff,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a California Banking Corporation, Defendant.

### TRANSCRIPT OF TESTIMONY

Los Angeles, California

Monday, November 8, 1948

Appearances: For the Plaintiff: Irwin R. Buchalter and Richard L. Moss, 1215 Bankers Building, Los Angeles, California. For the Defendant: Roane Thorpe, 1112 Pacific Southwest Bldg., Los Angeles, California. [1\*]

(Case called by clerk.)

Mr. Thorpe: Ready.

Mr. Buchalter: Ready. If the court please, the bankrupt has been subpoenaed. I don't see her but I suppose she will be here very shortly. However, I suppose I could go ahead and call another witness.

The Court: Certainly. We can't wait for people who are coming.

Mr. Buchalter: Is Mr. Duval in court?

Mr. Thorpe: Mr. Duval is in court.

The Court: What is this case about?



Mr. Buchalter: This case is one filed by the Trustee in Bankruptcy, against the Security Bank, for the purpose of recovering a preference. It concerns the estate of Alvera Gordon Jones who has been adjudicated a bankrupt by the bankruptcy court of this Division.

The plaintiff will attempt to prove that the bankrupt had made a loan, in the early part of 1947, from the Security Bank. That loan went on unpaid and was renewed time and time again. Some time in August, 1947, the bankrupt appeared before the branch manager of the bank, a Mr. Duval, and told him she was having extreme difficulty in the payment of that note and that her business was in very poor condition. The [2] note was then again extended upon the condition that she pay \$50 per week. The note was some \$2,000. She paid two payments of \$50 per week and then she again returned to the Bank and told them that she was unable to continue making further payments; that she then wanted an additional loan to help her in her business which, by the way, was a chain of beauty shops. The bank manager told her, if she would submit some figures, after he studied them, he would refer it to the committee downtown, which was done. She came back about a week or so later and Mr. Duval told her that he would be unable, for the bank, to grant her any further loan but they would again renew the old loan for 90 days, on demand, but no later than 90 days.

She then told him again about the difficulties of her business; that she needed money badly; and

he told her he would try to see whether he could get some loan companies to lend her some money, and, as a matter of fact, referred her to some loan companies for that purpose.

She told him also she would try to sell one or two of the stores and would try to pay the bank off. Some time in January, 1948, she sold a store in San Bernardino and received therefor, as part consideration, a cashier's check, from the purchaser, in the amount of \$1450. She took the cashier's check and brought it to the bank and paid off her loan, adding thereto some \$200, some time in January, 1948. [3]

Immediately thereafter she made an assignment for the benefit of creditors and it resulted finally in a bankruptcy petition.

We contend, your Honor, that the bank had knowledge of the insolvency and certainly had reasonable cause to believe that she was insolvent, and that a preference was being given.

That is a brief resume of plaintiff's contentions in the matter.

The Court: Very well. You may proceed.

Mr. Buchalter: We will call Mr. Duval under the provisions of Section 21(j) of the Bankruptcy Act.

ROBERT R. DUVAL,  
a witness for the plaintiff under the provisions of Section 21(j) of the Bankruptcy Act, being first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: Robert R. Duval.

(Testimony of Robert R. Duval.)

Direct Examination

By Mr. Buchalter:

Q. What is your business or occupation?

A. Banking.

Q. By whom are you employed?

A. The Security-First National Bank.

Q. Were you so employed in January, 1947?

A. I was. [4]

Q. And where?

A. Melrose and Highland Branch.

Q. What was your position there?

A. Manager.

Q. Do you know Alvera Gordon Jones?

A. I do.

Q. Isn't it true, Mr. Duval, that, on January 6, 1947, the bank loaned Alvera Gordon Jones \$2,000?

A. That is correct.

Q. Do you remember the terms of that note?

A. All due in 90 days from the date of the note.

Q. When the 90-day period had expired, had the note been paid?      A. No, sir.

Q. When was it renewed, if it was renewed?

A. It was renewed but I can't tell the exact date.

Q. Was it April 30, 1947?

A. That is correct.

Q. For how long was that renewal period?

A. An additional 90 days, I believe.

Q. That would take it to July 30, 1947. Now, can you tell me whether or not anything had been

(Testimony of Robert R. Duval.)

paid between April 30, 1947, and July 30, 1947?

A. I can't tell you for sure.

Q. Do you have any records of the bank here which [5] might refresh your recollection?

A. Yes, sir.

Q. Would you mind getting them or having counsel give them to you? Will you please, Mr. Duval, first, tell us what that card is that you hold in your hand?

A. That is our record of loans made and payments made and any renewals that might have taken place.

Q. That is the bank record, is it not?

A. That is right.

Q. And that is made and kept by the bank?

A. That is correct.

Q. Looking at that card, can you tell me whether or not anything was paid after the renewal, up to July 30, 1947?

A. Nothing was paid up to that time; no, sir.

Q. What was done on that date?

A. The note was again renewed.

Q. For how long?      A. For 60 days.

Q. That would take it to September 30th. Was anything paid before September 30th?

A. Nothing was paid.

Q. What was done on that date?

A. Nothing was done at that particular date. It was eventually renewed for an additional—

Q. It wasn't renewed on September 30th, was it? [6]      A. No, sir.

(Testimony of Robert R. Duval.)

Q. And it was in default on October 1st?

A. Correct, sir.

Q. On October 22, 1947, there was a payment made?

A. Yes, sir.

Q. Of how much?

A. \$250.

Q. On October 31st there was an additional payment made, was there not?

A. Yes, sir.

Q. How much?

A. \$100.

Q. On December 2, 1947, another payment was made?

A. Yes, sir.

Q. For how much?

A. \$150.

Q. So that left a balance, on December 3, 1947, of \$1,500, is that correct?

A. Yes, sir.

Q. On December 6, 1947, what happened?

A. The \$1,500 balance was then renewed.

Q. For how long?

A. For 90 days.

Q. Wasn't that a demand note, with a 90-day limit?

A. Yes, sir. [7]

Q. When was the next payment made?

A. December 18th, \$50.

Q. Were there any further payments thereafter?

A. No further payments until it was paid in full.

Q. What date was that?

A. January 23, 1948.

Q. \$1,450 was paid?

A. Yes, sir.

Q. What about the interest? Was that also paid on January 15th?

A. Interest was paid in advance on the note. At that time we refunded a portion of unearned interest.

(Testimony of Robert R. Duval.)

Q. Have you any idea how much it was?

A. \$9.10.

Q. Mrs. Jones had been a good customer of the bank for some time, had she not?

A. Yes, sir.

Q. Did she give you any financial statements at any time?

A. She showed me one at one time but she never gave me any in all the time I was there.

Q. Do you remember when it was that she showed you this financial statement?

A. It was probably some time in—I am not sure of the date. [8]

Q. Was it before or after you renewed the note on December 6th?

A. I would say it was after.

Q. The bank has no financial statements of any kind in its records?

A. Some early ones; yes, sir.

Q. How early?

(Mr. Thorpe hands a document to the witness.)

A. We have them.

Q. Counsel has handed you a financial statement. Is that the only one that you have during this period from January 6, 1947, to January 23, 1948?

A. We have some even earlier than this. This is the latest one we have in our file.

Q. When was that statement obtained?

A. March 31, 1947.



(Testimony of Robert R. Duval.)

Q. Did you receive any statements after March 31, 1947?      A. No, sir.

Q. Did you ever ask her for one?

A. Yes, sir.

Q. What was her reply?

A. That her auditor was making one up.

Q. How often did you discuss the question of a statement with her? [9]

A. I had no occasion to discuss it with her until such time as she asked for additional funds.

Q. In August, 1947, isn't it true she asked for additional funds.

A. I don't recall the exact date she did ask for additional funds?

Q. It was some time during the summer and while the other note was unpaid, isn't that correct?      A. That is correct.

Q. Did she give you such a statement?

A. She presented one which she took back with her.

Q. Did you look at it?      A. Yes, sir.

Q. From that statement, did she have any net worth, to the best of your recollection?

A. She had a net worth; yes, sir.

Q. Do you have any idea how much it was?

A. I am sorry, I can't recall the figures.

Q. On April 30, 1947, when the note first became due, did you have a conversation with her with reference to the payment thereof?

A. The note was originally made on April 30, 1947.

(Testimony of Robert R. Duval.)

Q. Wasn't the note made January 6, 1947?

A. Not according to my records. I was not manager there at that time. [10]

Q. On direct examination, I think our records indicate that the original note was made January 6, 1947, and was renewed on April 30, 1947. Do you know whether or not that is correct or not?

A. I do not know.

Q. On July 30, 1947, when the note became due, did you have a conversation with her?

A. Yes, sir.

Q. Where did that conversation take place?

A. In the branch.

Q. In the branch bank?                      A. Yes, sir.

Q. What was the discussion with reference to the payment of that particular note?

A. She requested an additional time in which to pay it off.

Q. What did she say?

A. That she had taxes and so forth that she wanted to meet at that time, and requested that we grant her additional time.

Q. Did she tell you what kind of taxes would be due on July 30, 1947, or did you ask her what payments were payable at that time?

A. I believe that was the property taxes. I can't recall definitely. [11]

Q. Do you know of any taxes particularly due at that time of the year?

A. It could be delinquent real estate taxes or personal property taxes.

(Testimony of Robert R. Duval.)

Q. Did you have any further conversation with her on September 30th, which was the date to which the note had been renewed?      A. Yes, sir.

Q. And can you tell us what was said at that time about the payment of the note?

A. I can't recall.

Q. Isn't it true, Mr. Duval, that, on many occasions, you had requested information or payment from her?

A. When the note was due; yes, sir.

Q. And, around the 30th day of September, 1947, isn't it also true that the bank asked her for payment again or you asked her for payment again and she told you she didn't have the money?

A. I don't recall what she said but we definitely would ask for payment inasmuch as the loan was due.

Q. You didn't renew the note, as you testified, at the end of September and let it remain in default until it was renewed on December 6th. Between September 30th and December 6, 1947, you had a number of conversations with her, did you not? [12]

A. Yes, sir.

Q. In one of those conversations, isn't it true that she came to you for more money?

A. Yes, sir.

Q. And that is when she submitted the figures to you?      A. Yes, sir.

(Testimony of Robert R. Duval.)

Q. Isn't it also true that you said you couldn't give her a loan, but, however, you would submit it to the committee downtown?

A. Not exactly that, sir.

Q. All right. Tell us what took place.

A. I informed her I couldn't make the loan and she requested or asked me who she could talk to at our downtown offices, inasmuch as she thought she deserved at least the right to talk to someone down there and find out what our exact position was on it.

Q. What did you tell her?

A. I gave her the name of one of the officers downtown and suggested she go down and talk to him; that he would be the one to discuss the matter with her.

Q. Do you know whether she went downtown?

A. She did.

Q. And do you know what the result of that conference was?      A. Yes, sir. [13]

Q. What did they tell her?

A. That we would not be in a position to grant her an additional loan inasmuch as the one we had now was due and we felt we should first be paid off before we considered additional loans, and at the same time gave her the names of some outside loan companies whom we thought would probably be interested in such a deal.

Q. During the time that we have just mentioned, October, November and the early part of December, did you have a conversation with her, in which you

(Testimony of Robert R. Duval.)

told her that your best advice to her would be to sell off some of her beauty stores?

A. Yes, sir.

Q. And didn't you tell her that, in your opinion, she was in very bad financial condition and that would be the only way she could pay the bank and straighten herself out?

A. I don't know that those are the exact words but I did suggest she try to dispose of some of her outlying stores in order to get in a better position.

Q. You mentioned that you did send her to some loan companies?

A. I believe I suggested some; yes, sir.

Q. Mr. Duval, isn't it also true that about that time you were informed by her that she was heavily indebted, in many thousands of dollars, to the United States Government for withholding Social Security and taxes? [14]

A. No, sir.

Q. Did you know it at any time?

A. No, sir.

Q. Take a look at that statement of March 31 that you have in front of you. I call your attention to an item called "Accrued Taxes Payable." Will you tell us how much that amount is?

A. \$7352.

Q. Did you ever have any discussion with Mrs. Jones, after March 31st, in which you asked her whether or not that liability had been reduced?

A. No, sir.

Q. Did she ever tell you that that tax item was in excess of \$12,000 in August, September or October?

A. No, sir.

(Testimony of Robert R. Duval.)

Q. Was there any further discussion of any kind with reference to taxes due to the United States Government? A. No, sir.

Q. Or to the State of California?

A. No, sir.

Q. You kept an eye on her account, didn't you, the checking account? A. Yes, sir.

Q. During this entire period, she was overdrawn many times, was she not? [15]

A. A number of times; yes, sir.

Q. On some occasions, the bank honored the overdrafts, did it not? A. Yes, sir.

Q. On many occasions, the bank returned the checks marked "Insufficient Funds," or however the bank marks them? A. Very few times.

Q. In many cases, you paid them?

A. Yes, sir.

Q. Have you any idea how much the overdraft was at various stages?

A. Oh, various amounts.

(Mr. Thorpe hands some papers to the witness.)

Q. In November, 1947, the records of the bankrupt show an overdraft of \$1774. Does that coincide with the records of the bank? A. No, sir.

Q. Will you tell us what it would indicate?

A. It indicates no overdrafts of any kind in November, 1947.

Q. What about October, 1947? Or let me withdraw that question. You have here a ledger sheet of the Security-First National Bank of Los An-



(Testimony of Robert R. Duval.)

geles, of the Leroy Gordon Beauty Salons, a commercial account. This, I assume, is the bank's record of deposits and withdrawals made by the Leroy [16] Gordon Beauty Salons, is it not?

A. That is correct.

Q. And the Leroy Gordon Beauty Salons is Alvera Gordon Jones?           A. Yes, sir.

Mr. Buchalter: We would like to offer the entire record into evidence, of course, with the stipulation, Mr. Thorpe, that you can substitute a photostat copy.

Mr. Thorpe: I was just wondering how we can get a photostat copy. Can you read it into the record, what figures you want?

Mr. Buchalter: I imagine we can.

The Witness: That is a part of our records.

Q. (By Mr. Buchalter): Mr. Duval, I think we will have to have the record. I will tell you what I can suggest. You can take it out with you and then photostat and file the photostat later, if it meets with your Honor's approval.

The Court: It will have to be under the control of the Clerk if you introduce it in evidence.

The Witness: These are permanent records.

Mr. Buchalter: All right. We can read it in. Is there any way, Mr. Clerk, that we can get photostats here of this sheet?

The Clerk: If they wish to pay the Clerk's charge for photostating, the Clerk will photostat them in the office. [17]

Mr. Buchalter: We will be very happy to do it.

The Clerk: I believe it is 25 cents a page.

(Testimony of Robert R. Duval.)

Mr. Buchalter: May we offer this in evidence as Plaintiff's exhibit first in order?

Mr. Thorpe: I would like to object to the introduction of it, if the court please, on the ground it is incompetent, irrelevant and immaterial. Counsel hasn't stated the purpose for which he wishes it introduced. That sheet shows some overdrafts on the account, apparently. I don't apprehend that that will establish the point that you wish to establish, counsel.

Mr. Buchalter: If the court please, the law is very well settled that, where a bank has, over a period of time, especially when a note is in default, distinct evidence that the account is overdrawn, that is knowledge or at least reasonable cause to believe the fact that the debtor is insolvent. And, if counsel would like a case, we have one exactly in point.

Mr. Thorpe: If the court please, there is being introduced here an isolated sheet which doesn't show the four figure balances of the account both before and after that particular sheet. We submit that, if that part of it should be introduced, then the rest of the account should be introduced to show what the situation is. It is like taking an isolated page out of a book and quoting from that page and [18] saying that the page is all that there is.

The Court: It may be received as far as it goes. Overruled. It may be admitted.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(Testimony of Robert R. Duval.)

[Printer's Note]: Plaintiff's Exhibit No. 1 is set out in full at page 13 of this printed Record.

Q. (By Mr. Buchalter): Mr. Duval, I show you Plaintiff's Exhibit 1. Isn't it true that the account of the bankrupt, on October 1, 1947, which is a date after which the note was now in default, was overdrawn \$2319.33? A. That is correct.

Q. And, on October 2nd, the account was overdrawn \$4,059.82? A. Yes, sir.

Q. And then the peak for the month of October was October 3, 1947, which shows an overdraft of \$5,100.42? A. Yes, sir.

Q. From there on down, until October 11, 1947, there is a constant overdraft, winding up on the 10th of October, 1947, with only \$788.86 overdrawn?

A. Yes, sir.

Q. And October 11th is the first credit balance to the depositor, of \$106.22, is that correct?

A. Yes, sir.

Q. On October 14, 1947, the account was then again overdrawn some \$393.33?

A. Yes, sir. [19]

Q. The rest of the month there was a credit balance to the depositor's credit, was there not?

A. Yes, sir.

Q. Do you have November? A. Yes, sir.

Q. Does the month of November show any overdraft? A. No, sir.

Q. What about December, that is, up to the 6th of December, when you renewed the note?

A. No, sir.

(Testimony of Robert R. Duval.)

The Court: What was the date the petition in bankruptcy was filed in this matter?

Mr. Buchalter: March 5, 1948.

Q. Do you know, Mr. Duval, whether or not the deposits of all of the beauty stores came into this particular branch?

A. I am not sure. I believe they did.

Q. The Security Bank has branch banks, has it not?      A. Yes, sir.

Q. Do you remember a conversation, some time from December, 1947, to January of 1948, in which Mrs. Jones said to you that she was in extreme financial difficulty and that she thought the best way out for her was to go into receivership, and she used the specific word "receivership"?

A. No, sir.

Q. You don't remember that at all? [20]

A. No, sir.

Q. That was in September, 1947, that she mentioned the word "receivership," was it not?

A. No, sir; I don't recall.

Q. As a matter of fact, do you recall any time during this one-year period that she mentioned the word "receivership???"      A. No, sir.

Q. As a matter of fact, didn't you say to her it would be very foolish on her part to attempt to go into receivership and that, in your opinion, she should stick it out; that you would help her get a loan somewhere else?      A. No, sir.

Q. You didn't make the original loan in January, 1947, did you?      A. No, sir.

(Testimony of Robert R. Duval.)

Q. As a matter of fact, that loan was in existence at the time you came into that position?

A. Yes, sir.

Q. You don't know, then, what the consideration was or what the story is about the making of the original loan, do you?      A. No, sir.

Q. Did you know that, in the summer of 1947 and in the fall of 1947, she was losing money on these beauty parlors? [21]

A. I had knowledge that, as far as what she informed me, she was probably losing money on a couple of them.

Q. How many stores did she have?

A. My understanding was she had about 16.

Q. And she told you she was losing money in only a couple of them?

A. That is right, sir.

Q. Did she tell you she was making money in the rest of them?      A. Yes, sir.

Q. Do you remember this statement at all, that you mentioned a moment ago—in your August conference with her, when she submitted the figures, were they drawn on a document of some kind or were they in rough, on yellow paper? Do you know that at all?

A. It was a regular audit that you would receive from larger companies.

Q. And did you ask her for a copy of it?

A. No, sir.

Q. Did she volunteer to give you one?

A. No, sir.

(Testimony of Robert R. Duval.)

Q. Isn't it true that, pursuant to that statement, there was quite a large deficit?

A. In her statement?

Q. Yes, sir. [22]

A. No, sir. She showed a net worth at that time.

Q. Have you any idea how much it was?

A. No, sir.

Q. Did you ever go to look at the stores or the equipment in any of the stores? A. No, sir.

Q. And you don't know what the condition of that equipment was, do you?

A. I do not, sir.

Mr. Buchalter: Nothing further.

Mr. Thorpe: No cross-examination.

The Court: You may be excused.

Mr. Buchalter: I would like to call one witness out of order, your Honor. It is an accountant and I would like to get him out. Have you any objection?

Mr. Thorpe: Not at all.

Mr. Buchalter: Mr. Ellis.

### AUSTIN H. ELLIS

a witness for the plaintiff, being first duly sworn was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Austin H. Ellis.

### Direct Examination

Q. (By Mr. Buchalter): Mr. Ellis, what is your business or occupation? [23]

A. Public accountant.



(Testimony of Austin H. Ellis.)

Q. And as such did you have any connection with Alvera Gordon Jones as the proprietor of the Leroy Gordon Beauty Salons? A. Yes, sir.

Q. What was your connection?

A. Our connection was bookkeeping and accounting.

Q. And did you do the accounting or bookkeeping for that particular firm? A. That is right.

Q. And were you such, or your firm, in 1947 and the early part of 1948?

A. As I remember, we started there about the 1st of August, started our work.

Q. What year?

A. Of 1947. And I think we prepared the January, 1948, statements.

Mr. Buchalter: Mr. Thorpe, it will be a lot easier if you come over here and look at these records.

Mr. Thorpe: Yes; I will.

Q. (By Mr. Buchalter): Mr. Ellis, I show you the books and records of the bankrupt and pick out a page. Can you tell me what this page is?

A. It is cash in bank, Security National Bank.

Q. Will you tell me the amount of the overdraft, if [24] any, shown on those records, in November, 1947?

A. I take it that you mean November 30th?

Q. That is right.

A. At the end of the month, it was \$1774.

Q. What about December 30th?

A. \$4993.59.

(Testimony of Austin H. Ellis.)

Q. In your capacity in connection with the company, did you prepare any statements for Mrs. Jones?      A. We did.

Q. Did you prepare a statement some time in August, 1947?

A. I believe that is the first one we prepared.

Q. Do you have a copy of that with you?

A. I do have.

Q. May we see it?

A. May I have a ruling from the court whether it is satisfactory to show that?

Q. I think the court will tell you that you can show it.

The Court: I didn't hear any objection to it.

Mr. Buchalter: We have never seen it, Mr. Thorpe, and Mr. Ellis wanted to know whether or not—or he wanted the court to tell him to produce it.

Mr. Thorpe: What is the purpose of the statement?

Mr. Buchalter: I want to show it to Mr. Duval, to find [25] out whether or not that is the statement he saw. Mr. Duval has testified that, in August, he saw some figures and I would like to find out if those are the figures he saw. We have never seen this statement, either.

Mr. Thorpe: There will be no objection to it.

The Court: Very well. There is no objection.

The Witness: This is it.

Q. (By Mr. Buchalter): I show you this statement, Mr. Ellis, and will ask you whether or not this was made under your supervision.

(Testimony of Austin H. Ellis.)

A. It was.

Q. The bank overdraft, on August 31, 1947, was how much? A. \$3217.52.

Q. Do you have more than one copy of this?

A. No, sir.

Q. Is this the only copy that you have?

A. That is all.

Q. Will you please tell us, Mr. Ellis, from that statement, what the assets of that business were on August 31st?

A. In telling you what the assets were as of that date, that would have to be qualified the same as they were in our report.

Q. That is fine. You go right ahead.

Mr. Thorpe: If the court please, there has been a lot of [26] testimony about this statement and the witness has testified that it is the statement he did prepare at that time, and it would seem that the statement itself is the best evidence of what the financial situation of the bankrupt was on the date of the statement. And we would like to have the statement itself introduced.

Mr. Buchalter: I have no objection. As a matter of fact, I think it should be introduced.

The Court: Very well; it may be admitted.

The Clerk: Plaintiff's Exhibit No. 2.

[Printer's Note]: Plaintiff's Exhibit No. 2 is set out in full at page 15 of this printed Record.

Mr. Thorpe: It speaks for itself.

Q. (Mr. Buchalter): Would you go ahead,

(Testimony of Austin H. Ellis.)

then, Mr. Ellis, and give us the assets of that business?

A. The change fund at the stores was \$115; cash in branch bank, \$70.83; petty cash fund, \$1.82; inventory, \$31,287.08. "But the merchandise and supply inventory was taken by the manager and one assistant at each store, each signing for the accuracy of the count. A letter of instruction had been sent to each manager, giving adequate and complete instructions on taking the inventories. A copy of this letter is enclosed for noting. Also enclosed is a summary of inventory amounts by stores, which reflect a consistent amount in the various locations. There were two exceptions, where the manager only signed. The warehouse inventory was taken by the warehouseman and one assistant. Pricing and extension [27] was done in the main office by your employees. We test-checked these prices and extensions to the extent we deemed appropriate and found them in order." The next subject is furniture and fixtures. These were taken at book figures which had been recorded as of July 1, 1946, when Mrs. Jones took over this business as a single proprietorship.

Q. What was that figure, Mr. Ellis?

A. Net—well, the total is \$16,721.03, less depreciation of \$2600.90.

Q. That left \$14,120.13. Those are the fixtures themselves, are they not?      A. That is right.

Q. And you did not know the actual value? That was just a book value?      A. That is right.

(Testimony of Austin H. Ellis.)

Q. Now, will you give us the next item?

A. Leaseholds.

Q. How much was that amount?

A. \$5,675, less amortization of \$515.92.

Q. What is the next item?

A. Leasehold improvements.

Q. How much?

A. \$2583.54, less depreciation of leasehold improvements of \$129.18.

Q. Can you tell me the difference between leaseholds [28] and leasehold improvements?

A. Yes, sir.

Mr. Thorpe: If the court please, I am going to object to any further testimony as to the items in this balance sheet here. It seems to me that the balance sheet itself is the best evidence of what is set forth therein and it will either show that the business is solvent or insolvent on the balance sheet prepared by this witness.

Mr. Buchalter: If the court please, I think we have a right to show what some of these items are, such as the last item, and another item of \$2,000 and some odd dollars, leasehold improvements. If the court is going to study this sheet, we ought to know what these items are and what they are computed on and whether or not they have any value.

Mr. Thorpe: If the court please, counsel has stated that he is going to ask Mr. Duval if this is the balance sheet that he saw some time in August. I take it that the purpose is to show that the bank had some knowledge of the insolvency of the bank-

(Testimony of Austin H. Ellis.)

rupt when this balance sheet was presented to them. The balance sheet itself, I think, shows a net worth of the business of \$19,450.35. Is that correct?

The Witness: Yes, sir.

Mr. Thorpe: So the only purpose of the balance sheet in the trial is whether or not Mr. Duval, as agent of the bank, had knowledge that the bankrupt was insolvent at the time [29] this statement was presented to him. It doesn't seem to me it is material for any other purpose. The witness himself stated that he did see a statement and that it showed a net worth at that time. Here is the statement apparently, if it is the statement the witness saw. And the only purpose it would serve would be to show whether the business was solvent or insolvent. This accountant has prepared a statement and the figures are there in the statement and the statement is in evidence before the court.

Mr. Buchalter: If the court please, the law is well settled that we do not have to prove actual knowledge of insolvency. We only need to prove that there is reasonable cause to believe that the debtor was insolvent. There is quite a difference. This man has testified that this is the statement but that there were certain qualifications. We must assume at this particular moment that Mr. Duval, as the manager of this bank, knows how to read a statement. And, even though a statement may show \$1,000,000 net worth, it is very possible that the statement would indicate or show good-will items, such as I am now trying to ascertain, and as to the



(Testimony of Austin H. Ellis.)

actual value. And we contend that the statement is very important and we will tie it in to Mr. Duval.

Mr. Thorpe: If the statement is important, anything that the statement discloses is now in evidence before your Honor. And it must also be assumed that the court is quite [30] capable of reading the statement.

Mr. Buchalter: Yes, but the court would have no way of knowing what these items are, whether they are of any value whatsoever.

The Court: You may pursue it. Objection overruled.

Q. (By Mr. Buchalter): Do you remember the last question?

A. Yes, sir. If you should buy a store and pay \$7500 for it, and the equipment and the actual inventory would be worth \$1,500, and you are so anxious to get into that store from a money-making standpoint that you will still pay \$7500 for it, in order to buy the lease and get into it, and you paid \$6,000 for a leasehold, that is just an example.

Q. Therefore, this item on the balance sheet, leaseholds, \$5,675, with the \$515 depreciation, or a total of \$5,159.08, is exactly this example; that it is merely for the purchase of various leases of stores?

A. That is right.

Q. What is the other item of leasehold improvements?

A. If you put in fixtures and the like, that you cannot take out, they would have to be considered leasehold improvements.

(Testimony of Austin H. Ellis.)

Q. That doesn't include any permanent wave machines or equipment? [31]      A. No, sir.

Q. These are repairs to the lessor's property?

A. That is right.

Q. And that totaled how much?

A. \$2583.54.

Q. Were there any other items?

A. We had deposits amounting to \$232.50.

Q. Mr. Ellis, can you tell us what the liabilities are?

A. As of August 31st, \$39,579.87. That, again, I wish to qualify, as I see here, "An extensive effort has been made to determine the extent of the liability of accounts payable. All bills found have been recorded and are reflected in the statements. We are advised that adjustments are due on some of these payables in the approximate amount of \$1100. These cover such claims as returned merchandise and so forth. From a conservative standpoint, we have not effected such adjustments on the records until documentary evidence is furnished to support the reduction of the liability. A schedule of accounts payable is enclosed."

Q. Will you please look at the accounts payable as such and tell us how much those were?

A. \$39,579.87.

Q. How much of that was trade accounts?

A. \$22,805.18. [32]

Q. Can you tell me whether or not any of that was delinquent?      A. Not at this time.

Q. Do you mean you can't tell me or that it was not delinquent?      A. I cannot tell you.

(Testimony of Austin H. Ellis.)

Q. There is also a large tax item there for various taxes, both to the State and the Federal Government, is there not? A. That is right.

Mr. Buchalter: No further questions.

Cross-Examination

Q. (By Mr. Thorpe): What is the date of that statement? A. August 31, 1947.

Q. You stated before, I believe, that it shows a net worth in the business?

A. That is right, sir.

Q. Of how much? A. \$19,450.35.

Q. When you speak of a net worth, do you mean that, after deducting the liabilities from the assets, the business was worth \$19,450.35, is that correct?

A. That would be true if the assets are considered in connection with the qualifications in the statement. [33]

Mr. Thorpe: That is all.

Mr. Buchalter: You may be excused, Mr. Ellis. Thank you.

The Witness: Do we get this back?

The Court: When a copy is substituted.

The Clerk: After appeal time expires, all exhibits are returned to the parties.

Mr. Buchalter: Mr. Ellis, do you have any objection if the court keeps this for a couple of months and then sends it back to you, or would you rather substitute a copy right away, in the next day or two?

The Witness: If these other statements are going to be photostated, why couldn't we photostat

(Testimony of Austin H. Ellis.)

this, too?

Mr. Buchalter: Is that the only record you have?

The Witness: That is right.

Mr. Buchalter: All right. We will photostat that also.

The Clerk: Is that agreeable?

The Court: Yes; that is agreeable.

Mr. Buchalter: Mrs. Jones.

ALVERA GORDON JONES

a witness for the plaintiff, being first duly sworn,  
testified as follows:

The Clerk: Will you state your name, please?

The Witness: Alvera Gordon Jones. [34]

Direct Examination

Q. (By Mr. Buchalter): Mrs. Jones, you did business under the name of Gordon Beauty Salons?

A. Leroy Gordon Beauty Salons.

Q. That was your own business, was it not?

A. Yes.

Q. And some time in the early part of this year you were adjudicated a bankrupt by the Bankruptcy Court of this District?      A. Yes.

Q. And Mr. Francis F. Quittner is the trustee in bankruptcy, is he not?      A. Yes.

Q. In 1948, in January, you sold a store in San Bernardino, is that correct?

A. I sold a store in San Bernardino and I am not sure about it being January. I don't remember.

Q. How did you receive the deposit from that sale? In what form? Was it money, check, cash or what? Do you remember?

(Testimony of Alvera Gordon Jones.)

A. At this moment, I don't remember.

Q. Wasn't some \$1400 paid to you out of escrow upon that store?

A. I believe that was the amount. I can't remember, either. [35]

Mr. Buchalter: If the court please, I would like to have the record show at this time that, apparently, this witness is going to be an adverse witness. I would like to call her under the provisions of Section 21(j) of the Bankruptcy Act.

The Court: You may do so. That is the rule.

Q. (Mr. Buchalter): Isn't it true, Mrs. Jones, that Mr. Coryell gave you a cashier's check, for some \$1400, which you delivered to the Security-First National Bank?

A. I don't believe the cashier's check was for \$1400.

Q. How much was it for?

A. That I can't be positive of.

Q. Do you remember your testimony before Referee Brink?

A. No; I can't say that I do.

Q. Do you remember reading a transcript of the testimony just a few days ago? A. Yes.

Q. Do you remember reading this:

"Q. Do you remember the total purchase price on the San Bernardino store?

"A. In actual cash, I believe, it was either \$1600 or \$1700.

"Q. Of which \$1400 was paid out of escrow?

"A. That is right.

(Testimony of Alvera Gordon Jones.)

“Q. What did you do with the \$1400? [36]

“A. I paid a note at the Security-First National Bank.

“Q. Was that money deposited in the Leroy Gordon account first?

“A. No; I don't believe so.

“Q. Mr. Coryell gave you his check, isn't that correct?

“A. No. It was a cashier's check.

“Q. Did you take that cashier's check over to the Security-First National Bank?

“A. I believe I did because I paid them with a cashier's check.”

Do you remember reading that?

A. Yes; I do remember it but I didn't remember what I had said in there, and at the time I didn't remember specifically.

Q. Does it refresh your recollection now?

A. Yes.

Q. Are those the facts?

A. Did I say in there that they were actual facts?

Q. Yes.

A. Because at that time I tried very hard to remember them, and at this point I don't recall that even they are correct. I would have to check on records to be positive that those are correct statements.

Q. Mrs. Jones, you did business with the Security Bank, did you not? [37]

A. Yes, sir.



(Testimony of Alvera Gordon Jones.)

Q. And, in January, 1947, you borrowed \$2,000 from them?

A. I borrowed \$2,000 from them and I don't recall the date.

Q. Was that before or after Mr. Duval became the manager?

A. I had a loan at one time that was paid off.

Q. We are talking about a \$2,000 loan.

A. Yes; I arranged for that, I believe, through Mr. Duval.

Q. Do you believe Mr. Duval made the first loan at the bank, this \$2,000 loan, which was subsequently paid with this money?

A. Yes; I believe so.

Q. Were you here when Mr. Duval testified before?      A. Just the latter part of it.

Q. Did you hear him testify with reference to the original loan that was made by his predecessor? Did you hear that portion of his testimony?

A. I didn't listen that carefully. I had one loan from the bank I paid back.

Q. I understand. Was that also \$2,000?

A. I believe so.

Q. In April of 1947, April 30th, that note was renewed, [38] was it not?

A. It was renewed but I can't be sure of the date. I just can't recall it.

Q. You know it was renewed the first time it became due?      Yes.

Q. And nothing had been paid on it?

A. No.

(Testimony of Alvera Gordon Jones.)

Q. Did you have a conversation with Mr. Duval at that time?      A. Yes. [38a]

Q. What did you tell him?

A. I can't recall the exact words.

Q. You told him you couldn't pay the note, didn't you?      A. Yes.

Q. You told him you didn't have the money, didn't you?

A. I suppose I did or I wouldn't be renewing it.

Q. And you also told him you would like to have it renewed, did you not?

A. Well, I must have from the standpoint that I did have it renewed, but I don't recall the conversation exactly with him.

Q. That note was again renewed, was it not?

A. I believe so.

Q. Those were 90-day renewals, were they not?

A. That I don't recall.

Q. You know it was renewed again whenever it became due?      A. Yes.

Q. Now, Mr. Duval, testified that that renewal was on July 30, 1947, and he testified from the bank records. Would that give you any idea as to when it was renewed again?

A. Well, if the bank records show it, that would be the time. [39]

Q. Just before it was renewed, did you again have a conversation with Mr. Duval?

A. Yes; I must have.

Q. And what did you tell him?

A. Those conversations I don't recall. I don't recall them.

(Testimony of Alvera Gordon Jones.)

Q. Just recall it to the best of your recollection.

A. I truly can't remember.

Q. You also told him at that time you didn't have the money, didn't you?      A. Yes.

Q. And you would like to have it renewed? The note, I am talking about.

A. Yes. Actually, I said I wanted the note renewed. As to whether or not I said I couldn't pay it or the circumstances were such that it was more advantageous to the business not to pay that note then, there is a difference there, and whether that was my conversation with Mr. Duval I don't recall.

Q. In any event, it was again extended, was it not?      A. Yes.

Q. And it was extended to September 30th, for 60 days, isn't that true?

A. I don't recall the length of extension on those but I believe it was either two months or three months. [40]

Q. Mr. Duval testified it was extended to September 30, 1947. Do you believe that is correct?

A. Yes; I could assume that that was correct.

Q. About that time you went to see Mr. Duval with a new financial statement, didn't you?

A. At what time?

Q. At the time around September or August, some time in September.      A. Yes.

Q. And you had with you a copy of a statement that Mr. Ellis had prepared for you, did you not?

A. Yes.

(Testimony of Alvera Gordon Jones.)

Q. I show you plaintiff's Exhibit 2, which is a copy of a statement made by Mr. Ellis, and ask you whether or not that is a copy of the statement that you had when you went to see Mr. Duval.

A. Yes; this is.

Q. And what was the conversation that you had with him at that time?

A. I requested a loan.

Q. And what did he say?

A. He said that he would take the record, the financial statement, and would check into it.

Q. And did you leave the statement with him?

A. I believe I did. [41]

Mr. Thorpe: What was that last answer?

(Answer read by reporter.)

Q. (By Mr. Buchalter): Did you have a conversation with him a day or two later with reference to his decision after he checked into it?

A. Yes.

Q. What did he say?

A. He said I wouldn't be able to have it.

Q. You say "it." Do you mean the loan?

A. That I wouldn't be able to get the loan.

Q. What else did he say, if anything?

A. I wanted an explanation.

Q. What did he say?

A. And I went to downtown Los Angeles.

Q. Let's, first, find out what else he had to say.

A. I don't believe at that time—I can't recall any conversation with Mr. Duval at that particular time.

Q. As a matter of fact, you told him you wanted

(Testimony of Alvera Gordon Jones.)

an explanation and he said he **couldn't make** the loan and, if you wanted to go to the downtown office, he would give you the name of a man to see, isn't that correct?

A. Yes; that is what he mentioned.

Q. On September 30, that note was again due and demand was made upon you for payment, was it not?      A. Yes. [42]

Q. You didn't pay it then?      A. No.

Q. Did you have any conversation with Mr. Duval, after you had returned from the downtown office, in which they told you they couldn't help you at the bank?      A. Yes.

Q. That conversation was in the early part of December, was it not, 1947?

A. In regard to the loan?

Q. With regard to the renewal of the \$2,000 note.

A. In regard to the renewal? I, undoubtedly, went through the same explanation.

Q. Mrs. Jones, the note was not renewed on September 30th. The bank records indicate it was not renewed until December 6th and that you were delinquent from September 30th until it was renewed. In the meantime you had made a payment, on October 22, 1947, of \$250?

A. That is correct. Isn't it? Repeat that question, please.

Q. Is it true that you had made a payment of \$250 on October 22, 1947?

A. I don't recall the date. I, undoubtedly, made the payment.

(Testimony of Alvera Gordon Jones.)

Q. And another one for \$100 on October 31st?

A. Yes. [43]

Q. And \$150 on December 2nd, all in 1947?

A. That I don't remember, whether I did or not. I would have to look on the records to know that. I don't recall it. I haven't seen the records in about nine months.

Q. You do not also remember that this note was delinquent during this period of time and was not extended until December 6th, or that it was renewed, rather, on December 6th?

A. I don't recall whether it was renewed at that time but I was given an extension on that note.

Q. That means practically the same thing, Mrs. Jones. Was either one of those things done, renewed or extended?      A. Yes.

Q. And that was for \$1,500, was it not, and, in the meantime, some \$500 had been paid down?

A. I can't say that is absolutely accurate.

Q. Didn't you have a conversation with Mr. Duval, in the early part of December, 1947, with reference to the unpaid balance on your note?

A. Yes.

Q. In which he told you he would have to have the renewal on the note and on a demand basis not to exceed 90 days?

A. Yes; I believe that is true.

Q. Did you have any conversation with him at that time [44] with reference to your financial difficulties?

A. I had a discussion with him at that time.



(Testimony of Alvera Gordon Jones.)

Q. What was the discussion?

A. I don't recall the exact discussion. If you could ask me what you would like to know about the discussion, I could answer it.

Q. Didn't you tell him you were having financial difficulties?

A. I may have said that but I can't remember exactly the wording.

Q. We don't expect you to remember the exact words. Let's have it in substance.

The Court: We will have to move along a little faster.

The Witness: I am sorry but I cannot recall the conversation.

Q. (By Mr. Buchalter): Let me refresh your memory again with reference to your testimony before Referee Brink:

"Q. Did you tell him you were having financial difficulties at that time?

"A. Yes; and he knew that anyway.

"Q. How did he know it?

"A. Because I hadn't been able to pay them the \$2,000 on the monthly basis."

Do you remember those questions and answers?

A. Would you read that again, please? [45]

Q. "Q. Did you tell him you were having financial difficulties at that time?

"A. Yes; and he knew that anyway.

"Q. How did he know it?

"A. Because I hadn't been able to pay them the \$2,000 on the monthly basis."

(Testimony of Alvera Gordon Jones.)

A. Yes; that must be right.

Q. "I would like to have you relate all the conversation you had with him in reference to your not being able to pay the loan.

"A. Well, I don't recall all the conversations just exactly but he knew I was struggling along because he had many, many times been of great assistance to me, and he had been doing that since July of 1946; so, he was well acquainted with the entire structure of the business; and, in fact, he is the gentleman to whom I took a financial statement in August."

Do you remember that question and answer?

A. Well, I know I took a financial statement to him.

Q. Do you remember reading this the other day?

A. Yes.

Q. Does that refresh your recollection?

A. No; it doesn't. At the time I gave that testimony, I was under stress and strain and I still don't recall those conversations. [46]

Q. Let me read further:

"Q. Did he know you were losing money right along? A. Yes.

"Q. Did you discuss that with him?

"A. Yes; and, in fact, he was the gentleman I went to see in regard to getting a loan and I was assured that with the paper I had with the figures that Mr. Ellis of Nielson & Ellis had prepared—not the actual financial statement, but in August some figures which the financial statement would

(Testimony of Alvera Gordon Jones.)

be based on—and I was assured at that time that they were sure I could get a substantial loan.”

Do you remember that?

A. And I said in there that Mr. Duval gave those statements?

Q. Yes.

A. If I gave those statements at that time, they are, undoubtedly, true. However, at this point I don't recall long conversations with him any more than this statement that is right here.

Q. Mrs. Jones, do you remember a conversation at the end of September, or some time in that part of the year, of 1947, in which Mr. Duval told you, “Well, start paying the note off at \$50 a week”?

A. I believe Mr. Duval said that I could make one payment of \$50 and I was to make another payment immediately, [47] and then it would have to be more at that time.

Q. In other words, he wanted you to pay it out on some type of weekly basis, isn't that correct?

A. I don't believe I had a weekly arrangement on that. I think I was to pay it as quickly as possible.

Q. Do you remember when that conversation took place?

A. No; I don't. That is the reason that I said I wasn't sure that the note was renewed; that it was extended. I was given time. But I cannot be positive of that.

Q. Let me refresh your recollection again, reading from your testimony before Referee Brink—

(Testimony of Alvera Gordon Jones.)

strike that for the moment. Did you have a conversation with him after you failed to make weekly payments?      A. That I don't remember.

Q. Do you remember whether or not you were ever overdrawn?      A. Yes; I was.

Q. You were overdrawn?      A. Yes.

Q. Did you ever have a conversation with him, in November, 1948, when your overdraft was as high as \$5,000, with reference to your financial condition at the bank?

The Court: You say in 1948?

Mr. Buchalter: I meant 1947.

The Witness: I should judge that I had conversations [48] with him.

Q. Do you remember the conversations?

A. No; I don't. You see, I was in and out of the bank every day.

Q. Yes. And what was the conversation with reference to these notes and your financial condition, each and every day?

A. I didn't always stop to talk with Mr. Duval but he always asked me how the business was and I always said, "We are doing fine. We are getting along grand."

Q. Didn't you tell Mr. Duval that some of the stores were not making any money?

A. I may have said that at some time in some of our discussions, especially when Mr. Ellis had made his first audit.

Q. That is when they told you that they wouldn't lend you any more money?      A. Yes.

(Testimony of Alvera Gordon Jones.)

Q. As a matter of fact, Mr. Duval was becoming quite insistent about the payment of this note, was he not, in November and December, 1947?

A. By "insistent" what do you mean?

Q. That he kept demanding the money and wanted to talk to you constantly about payment of that note.

A. That is awfully hard to answer. Naturally, he spoke [49] to me about the note. It had been renewed several times and he was concerned about it. But Mr. Duval was never ugly about it.

Q. Didn't you finally tell Mr. Duval that you were going to sell a store and that you would give him the money from the store?

A. I don't believe I did.

Q. Let me refresh your recollection from your testimony as given before Referee Brink:

"Q. Just before you paid them the \$1400 which Mr. Coryell paid you, did you tell them you were going to sell the store and give them the money?

"A. I told him that at the time I renewed the note; that is, I said that, if I could sell the store and when I did sell it, I would take care of the loan, and the understanding was that I would do so as quickly as I could."

Do you remember so testifying?

A. I believe that that was the substance of the conversation. However, I had been advised to sell stores earlier, much earlier than that. I believe you read that statement as saying "the store."

Q. "I said that, if I could sell the store."

A. I don't believe at the time I talked with Mr.

(Testimony of Alvera Gordon Jones.)

Duval I had a specific store in mind. I don't believe that I told him at the time of the renewal of any of those that [50] I would sell a store or any one of them for that purpose. It was understood that I would sell those stores——

Q. As quickly as you could?

A. Not just to dispose of them but to sell them wisely, to be able to take care of not only the obligation with the Security but with the creditors. And I believe the creditors understood that, too.

Q. All that took place when?

A. I believe that there was discussion on that—— will you repeat that question, please?

Q. When did that discussion take place?

A. In regard to what?

Q. The discussion with reference to selling stores for the purpose of paying the bank and other creditors.

A. Do you want me to answer as to a specific time?

Q. All times. If it took over a period of time, give us the period of time.

A. Well, all I know is that it was during the time I was attempting to work out a betterment of the situation, of disposing of the stores that were not paying and having that amount of capital to use for other purposes.

Q. That was in the latter part of 1947, was it not?      A. Yes.

Q. In September, October, November and December, 1947, over a course of—or a period of time? [51]



(Testimony of Alvera Gordon Jones.)

A. It might have been as late as——

Q. January, 1947?

A. No. However, I think there was a discussion, I am not sure with Mr. Duval or with whom, but I know I contemplated selling the stores as early as August.

Q. Anyway, it was before you paid the bank the money?      A. Yes.

Q. Do you remember a conversation with Mr. Duval at the time that they turned you down for the additional loan, in which you told Mr. Duval the conditions were becoming so serious that it might be necessary for you to go into receivership?

A. Is that the statement I made in there?

Q. Yes. Do you remember that conversation?

The Court: She is entitled to have the statement presented to her.

Mr. Buchalter: All right; I will read the statement.

The Court: Wait a minute. When you question witnesses as to their former testimony, they are entitled to have the document presented to them to look at, if they want it.

Q. (By Mr. Buchalter): In your testimony before Referee Brink—I will read you your testimony:

“Q. Did you have a conversation with Mr. Duval or with anybody else at the bank in which you said that conditions were becoming so serious that it might be necessary for you [52] to make an assignment for the benefit of your creditors?

(Testimony of Alvera Gordon Jones.)

"A. At the time they refused my loan, I told Mr. Duval then that I felt there was only one thing left for me to do, and I didn't know it was called assignment, but that I wanted to go into receivership; and he said I was very, very foolish to consider that.

"Q. When did that conversation take place?

"A. In September of 1947."

Do you now recall making that statement before Referee Brink?

A. No; I don't recall making that statement before Referee Brink, but, if I made that statement—this particular statement doesn't sound as if I could ever have made it.

The Court: I assume you are reading from the document of the Referee's Court?

Mr. Buchalter: Yes, Your Honor. I am reading from the reporter's transcript In the Matter of Alvera Gordon Jones, doing business as Leroy Gordon Beauty Salons, Bankrupt, No. 45,769, in the District Court of the United States, for the Southern District of California, Central Division, before the Honorable Benno M. Brink, Referee in Bankruptcy, as reported by E. B. Bowman, official reporter, 327 Federal Building, Los Angeles.

Q. Was anything said about receivership to Mr. Duval by you or by him? [53]

A. No; I don't believe so. May I say this? I was under the impression, due to the fact that I was not well, that I wanted to make some arrangement whereby the business could continue and I

(Testimony of Alvera Gordon Jones.)

would be able to have some time to myself that I could recover and come back into the business fresh, because I had worked very, very hard, and the only thing that I wanted to do was to have a couple or three months in which to do it, and I wanted the creditors to be taken care of. And, if I had a discussion in regard to receivership or assignment at that time, it was not with the thought of going into bankruptcy or complete failure.

Q. I understand that perfectly.

A. And, if I had a conversation with Mr. Duval as I said there, it was in that trend and not the fact that I had completely failed and the business was gone.

Q. I appreciate that fact. Now, I don't want to create the impression in your mind that you knew at that time you were going bankrupt. You knew, did you not, that your business was in severe financial difficulties and that you were looking for some plan to try to work it out so that the bank and all your creditors would have been paid in full? That is correct, isn't it?

A. Yes.

Q. And that is what you told Mr. Duval?

A. I told Mr. Duval I would like capital. [54]

Q. And you wanted capital to try to work out your situation, isn't that correct?

A. To better it.

Q. And didn't he tell you at that time that he couldn't help you any more; that the Security Bank couldn't give you any more money but perhaps some loan companies could help you?

(Testimony of Alvera Gordon Jones.)

A. Yes. They turned down the loan and I was given the names of loan companies, I believe, that I would be able to go to.

Q. The bank, as a result of your payments, was paid in full, was it not? The Security Bank had been paid in full?      A. Yes.

Q. I show you—and Mr. Thorpe, with your permission, I would like to introduce these by reference only, because they are the records of Referee Brink—I would like to show you the schedules in bankruptcy, signed by you, and which are the records of Referee Brink, and ask you whether or not these are your signatures.      A. Yes.

Q. I show you Summary of Debts and Assets and call your attention to debts of \$38,442.36. That is correct, is it not?

A. Do you mean correct on there?

Q. Yes. [55]

A. That is what it states there.

Q. On your original schedules?      A. Yes.

Q. And assets totaling \$9,474.47, is that correct?

A. Yes. Now, these figures—this was made out—

Q. Indicating the liabilities?

A. Yes. To verify that figure, it requires the books.

Q. I understand it requires the books, but these are your schedules which you signed?

A. Yes; that is right.

Q. And your schedules indicate those figures, do they not?      A. Yes.

(Testimony of Alvera Gordon Jones.)

Q. It shows unsecured claims of \$23,164.25, is that correct?      A. Yes.

Q. These were all unsecured creditors?

A. Yes.

Q. Showing on Schedule A-3 of your bankruptcy schedule?      A. Yes.

Q. Have any of these creditors received any money whatsoever?      A. At that time? [56]

Q. No; at this time or at any time.

A. Any part of this amount?

Q. Yes.      A. Not of this amount.

Q. Of the \$23,000?

A. No. But this was a heavier figure and these people were all paid, not every one of them, but a lot of those people were paid amounts during that period.

Q. But, finally, they wound up with these balances?

A. Yes; they wound up with these balances.

Q. So that there are certain creditors who received nothing?

A. By that statement, when you say they received nothing—I don't believe that is true because I believe there were checks written and there was money paid to various creditors.

Q. After your bankruptcy?      A. Not after.

Q. We are talking about after your bankruptcy. Did they receive any money after you filed the petition in bankruptcy on March 26th?

A. I didn't file the petition.

Q. Who did?

(Testimony of Alvera Gordon Jones.)

A. I don't know. Somebody put me in it.

Q. But you finally filed these schedules which I have [57] just shown you?

A. Yes. But I did not place myself in bankruptcy.

Q. It was an involuntary petition that was filed?      A. Yes.

Q. But you did file the schedules after you were ordered by the court to file schedules?

A. Yes.

Q. Did these unsecured creditors of some \$23,000 receive any money on their claims after that date?      A. After I went into bankruptcy?

Q. Yes.

A. Well, I don't know. I don't know what the procedure is. I don't understand that. I mean could they be paid?

Mr. Buchalter: Mr. Thorpe, will you stipulate that they haven't been paid any money?

Mr. Thorpe: I will so stipulate. If you had asked me to do that in the first place, I would have done so. We haven't any dispute about that, I don't believe.

Mr. Buchalter: Will you also stipulate that in the Referee's file the order confirming sale indicates that Mr. Quittner, who was then the receiver, sold all of the assets of this bankrupt estate for the sum of \$5,100?

Mr. Thorpe: Is that the fact, counsel?

Mr. Buchalter: Here is the record right here.

Mr. Thorpe: All right, I will so stipulate if you represent [58] that is the fact.



(Testimony of Alvera Gordon Jones.)

Mr. Buchalter: Mr. Thorpe, the Referee's file also indicates that it has in its file an appointment, oath and report of appraiser, Mr. John O. Bodkin, whereby all of the assets of the bankrupt were appraised at \$9,930, so that we don't have to leave the file here.

Mr. Thorpe: Do you want me to stipulate that is the fact?

Mr. Buchalter: Yes; I want you to stipulate the file contains such a document.

Mr. Thorpe: On your representation that it does, counsel, I will so stipulate.

Mr. Buchalter: Thank you. I will return this file to the clerk from Mr. Brink's office.

Q. Your assets, in November and December, 1947, and January, 1948, were substantially the same, were they not, Mrs. Jones, as they were in March, 1948, especially March 26, 1948?

A. That is difficult to answer. I believe perhaps you are correct in that statement but I am not sure.

Q. The equipment was still there? It was the same equipment except for some minor changes that may have been made in various of the stores, is that right? A. Yes.

Q. And purchases that had been made, that hadn't depreciated [59] in that two-or three-month period, had they, substantially? A. No.

Mr. Buchalter: No further questions.

#### Cross-Examination

By Mr. Thorpe:

Q. Mrs. Jones, referring back to this statement

(Testimony of Alvera Gordon Jones.)

dated August 31, 1947, can you state to the court whether or not your assets, in December, 1947, and January, 1948, were substantially as those shown by this balance sheet?      A. The assets?

Q. Yes, and liabilities of your company, of your shops, if they were substantially as shown by this balance sheet.

A. By December I had sold a few of the salons. So I would not show the figures that I have here.

Q. Did you reduce your liabilities from the proceeds of those sales?

A. I can't remember the figures, and I don't have them here, but it seems to me that they were reduced because now the figures that Mr. Buchalter just showed me were not the figures of this amount.

Q. What I am trying to get at—

A. However, the figures that he has might not have included all of these items. So it might have been substantially [60] the same.

Q. Mrs. Jones, did you ever have any conversation with Mr. Duval which would indicate to Mr. Duval that you were contemplating going into bankruptcy or that you were insolvent?

A. No.

Mr. Buchalter: That is—well, go ahead.

Q. (By Mr. Thorpe): Did Mr. Duval ever ask you if you were insolvent or how you were getting along in your business?

Mr. Buchalter: I want to object to the first part

(Testimony of Alvera Gordon Jones.)

of the question on the ground it calls for the conclusion of the witness.

Mr. Thorpe: The defendant here is charged with having knowledge of something——

The Court: Overruled. You have gone into this on both sides, as to what constitutes insolvency.

Mr. Thorpe: Will you repeat the question?

(Question read by reporter.)

The Witness: Well, that question, "How are you getting on in your business?" is an every-day question.

The Court: He is asking you, did he ask you that?

The Witness: It was answered in many various ways. When I came in specifically for anything, I would discuss the business but I never went into lengths as to what the problems were. Many times I said, "Business was slow" or "Business was up." What was the other part of your question that you asked? [61]

Q. (By Mr. Thorpe): Did you ever indicate in any way to Mr. Duval that your business was insolvent?

Mr. Buchalter: We object to that as calling for the conclusion of the witness.

The Court: Overruled.

Q. (By Mr. Thorpe): You may answer.

A. I don't believe I did. I don't recall placing the business on that basis.

Q. When you presented this statement, dated August 31, to Mr. Duval for an additional loan, you

(Testimony of Alvera Gordon Jones.)

wanted about \$12,000, did you not?

A. Yes; I believe that was the figure but I am not sure.

Q. Isn't it true that Mr. Duval told you that that amount was about what he could lend from the branch and that he would have to refer you to the head office?

A. Yes; I believe that is correct.

Q. And isn't it true that, when you went to the head office, the head office of the Security-Bank told you that they didn't like to make loans on beauty salons as such, and that that is the reason they referred you to a finance company?

Mr. Buchalter: To which we object on the ground that the question calls for the conclusion of the witness and is leading. [62]

The Court: This is cross-examination. Overruled.

Mr. Thorpe: Will you read the question, please, Mr. Reporter?

(Question read by reporter.)

The Witness: Yes.

Q. (By Mr. Thorpe): And the loan was not turned down then because of financial difficulties but it was turned down because of the type of loan that it was, wasn't it?

Mr. Buchalter: Just a moment. I submit that is strictly a conclusion, as to why the bank downtown turned down the loan.

The Court: She may state what was said between them and let the court decide that. Sustained. It is asking for a conclusion.

(Testimony of Alvera Gordon Jones.)

Q. (By Mr. Thorpe): Mrs. Jones, at the time you interviewed the head office of the bank for this loan, did they or did they not suggest to you that you were in such a financial position that you couldn't get a loan?

A. No; they didn't do that.

Q. They said, did they not, that it was a type of a loan that they did not make, and that they would suggest you go to a finance company, where you might get such a loan? Isn't that true?

A. It is awfully hard to say that that was just it. I know, after I had talked with the man at the branch, that I [63] was not perturbed by the fact that I could not get the loan. I mean his explanation was a satisfactory one and that I was told that I would be able to present such a loan elsewhere.

Q. When you went to the head office of the bank, did you present this statement, that has been introduced here as Plaintiff's Exhibit No. 2, to the head office? A. Yes.

Q. You had been overdrawn in your bank account, at the Melrose and Highland branch of the bank, many times prior to October, 1947, had you not? A. Yes.

Q. You had been overdrawn in the early part of the year, too, had you not? A. Yes.

Q. And the bank had every so often and rather frequently permitted you to overdraw for a few days, is that not correct? A. Yes.

Mr. Thorpe: I think that is all.

(Testimony of Alvera Gordon Jones.)

Mr. Buchalter: No further questions. The plaintiff rests.

The Court: You are excused.

Mr. Thorpe: If the court please, I wonder if I could ask that the witness be here this afternoon.

The Court: Yes. Be here this afternoon. They are not through with you. [64]

The Witness: All right.

Mr. Thorpe: It is 10 minutes to 12:00, your Honor——

The Court: Yes; we will recess until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock.) [65]

Los Angeles, California

Monday, November 8, 1948, 2:00 P.M.

Mr. Thorpe: Mr. Duval, will you take the stand, please?

ROBERT R. DUVAL,

a witness for the defendant, being heretofore duly sworn, being recalled, testified as follows:

The Clerk: You are Robert R. Duval?

The Witness: Yes, sir.

The Clerk: You have already been sworn, is that right?

The Witness: Yes, sir.

The Court: Are you calling him for further examination or what? Have both sides rested yet?

Mr. Buchalter: We rested.

Direct Examination

By Mr. Thorpe:



(Testimony of Robert R. Duval.)

Q. Mr. Duval, you testified this morning relative to some overdrafts on the account of Mrs. Jones. Would you explain to the court how those overdrafts usually arose?

A. Why, yes. Mrs. Jones had, I believe it was, 16 shops, in which she generally carried individual bank accounts wherever it might be convenient to that particular shop, and about once a week her managers would send in duplicate deposit tickets, showing how much she had deposited in these various bank accounts, and upon those deposit tickets she would draw a check which she would deposit into her main [66] account which was carried in my branch. Consequently, when she would sometimes inform me or show me how much she had on deposit in these other banks, we would be willing to go ahead and grant a temporary overdraft inasmuch as we knew this money was coming through to our account in our branch.

Q. Did Mrs. Jones ever discuss with you any financial difficulties?

A. Well, the only ones would be temporary difficulties in which she might need temporary working capital just for a temporary period; nothing outside of that.

Q. Did you ever have any conversation with her relative to whether her business was in a financially sound condition or otherwise?

A. No; I don't believe there was ever an occasion to discuss whether it was. I always felt it was.

Mr. Buchalter: If the court please, I move the answer be stricken after the word "No."

(Testimony of Robert R. Duval.)

Mr. Thorpe: I think the witness has a right to explain his answer, if the court please.

The Court: That is a conclusion, that he didn't think there was any occasion. He may state the facts which constitute that. I will sustain the motion to strike that part of it. Now he may explain what was done. Otherwise, he would be giving his opinion.

Mr. Thorpe: All right. [67]

Q. Will you state the facts, if any, relative to any conversation you ever had with Mrs. Jones concerning the state of her business?

Mr. Buchalter: To which we object on the ground he has answered there were none and, further, there has been no proper foundation laid.

The Court: He is speaking about a conversation between them. Overruled. He may answer.

The Witness: There never was any conversation in regard to whether she was in financial difficulties for the simple reason I didn't feel she ever was in financial difficulties.

Mr. Buchalter: I move "for the simple reason" and thereafter go out as a conclusion of this witness.

The Court: It may be stricken.

Q. (By Mr. Thorpe): I show you here, Mr. Duval, Plaintiff's Exhibit No. 2, and ask you if that is the financial statement or balance sheet which you testified to this morning as having been presented to you by Mrs. Jones.

A. That is; yes, sir.

(Testimony of Robert R. Duval.)

Q. Will you state to the court whether or not that is the last financial sheet or balance sheet showing the condition of Mrs. Jones' business that you ever saw?

A. That is correct; that is the last one I have ever seen.

Q. It is the last one you ever saw? [68]

A. Yes, sir.

Q. Did you know how many beauty salons Mrs. Jones operated, Mr. Duval?           A. Yes, sir.

Q. How many did she operate?           A. 16.

Q. Where were they located, generally?

A. They were located all over, more or less from Fresno down. I believe she had shops in Fresno, Santa Barbara, San Bernardino, and a number in Los Angeles. I don't remember all of the outlying cities.

Q. Would you explain to the court why the notes of Mrs. Jones were renewed these several times, as appears by the evidence this morning?

Mr. Buchalter: To which we object on the ground it calls for the conclusion of the witness.

Mr. Thorpe: I don't think so, if the court please.

The Court: Overruled.

The Witness: Well, it is more or less the policy of our bank that, although we may have an understanding with the customer we might extend them credit for a year's time, we, still, ordinarily write a note for 60 to 90 days, with the understanding that we would take a look at it at that time and, if we

(Testimony of Robert R. Duval.)

felt satisfied with their position, we would grant them an additional period of time on their note. [69]

Q. By Mr. Thorpe: Can you state to the court whether or not you would have renewed this loan of Mrs. Jones had you felt that she was unsound financially?

Mr. Buchalter: To which I object on the ground it is strictly a conclusion of the witness and incompetent, irrelevant and immaterial.

The Court: That calls for an opinion. Sustained.

The Witness: We would definitely not.

Q. By Mr. Thorpe: Just a minute, Mr. Duval. The Court sustained the objection. Will you state to the Court whether or not there was anything unusual about renewing this note for Mrs. Jones, and other than was customary in your business?

Mr. Buchalter: To which we object, again, your Honor, on the ground it calls for the conclusion of this witness as to what is unusual.

Mr. Thorpe: If the Court please, I think we can properly ask him what was customary in connection with the renewal of notes in the bank.

The Court: Overruled.

The Witness: I would say it was not particularly unusual. I have had that happen any number of times within the bank, to grant renewals when I felt that it was justified and a good reason for it.

Q. By Mr. Thorpe: What reason did you feel justified [70] you in making the renewals in this particular instance?

(Testimony of Robert R. Duval.)

Mr. Buchalter: That is objected to as calling for a conclusion and assuming facts not in evidence, that there was a reason.

Mr. Thorpe: If the Court please, the witness has just testified that he would renew notes when he felt it was justified. He must have had some reason here for renewing them.

The Court: Overruled.

Q. By Mr. Thorpe: Will you answer the question, Mr. Duval?

A. Well, the main reason was the fact that I had knowledge that Mrs. Jones was going to dispose of some of her stores, some of the outlying stores, and I felt, by disposing of those, she would have sufficient working capital and sufficient funds to pay us off when she found suitable buyers for the stores, which I felt she would have no trouble disposing of at a reasonable price.

Mr. Thorpe: I think that is all.

Cross Examination

Q. By Mr. Buchalter: As a matter of fact, Mrs. Jones did dispose of some of the outlying stores, did she not? A. I believe she did.

Q. Did she turn that money over to you or to your bank, rather? A. I couldn't say; no.

Q. Do you know that she sold some of the stores and didn't pay your loan, is that correct?

A. No, sir.

Q. Do you mean you don't know it is correct?

A. I do not know.

Q. You state that it was the policy of your bank to extend a note if there was an understand-

(Testimony of Robert R. Duval.)

ing that the debtor would have a year to pay, and then you would take a 60- or 90-day note, and then you would extend it if there was such an understanding? That is your testimony, is it not?      A. Yes, sir.

Q. You didn't make this original loan, did you?

A. No, sir.

Q. You don't know whether or not there was such an understanding or not, do you?

A. I talked to the former manager regarding the matter before I renewed the note the first time.

Q. Is there any indication on the bank record, which you had this morning, as to whether or not this loan was to be for a year?      A. No, sir.

Q. You say that it is a common practice and it is not unusual for the bank to give extensions and renewals? That is correct, is it?

A. That is correct. [72]

Q. But, where the debtor has repeatedly been in and discussed her inability to pay each time the note became due and has been running overdrafts, is that an unusual or a usual circumstance, within which the bank will extend a note?

A. It all depends on who the particular party might be. It is not always unusual.

Q. Do you recall your testimony this morning that, in November and December, 1947, there were no overdrafts of any kind? Do you remember that?

A. I believe I said in November there were no overdrafts. I don't believe I said December.



(Testimony of Robert R. Duval.)

Q. All right; let's take up the month of November. Will you tell us why there were not any overdrafts in November?

A. Probably because Mrs. Jones had sufficient—

Q. Wait a minute. We don't want your guessing and "probably" would indicate that you don't know. Now, if you know, answer it.

A. That there were sufficient funds in the bank so that there were no overdrafts.

Q. Isn't it true that you told her in October or the latter part of November that the bank would no longer honor any overdrafts?

A. I believe not, sir, inasmuch as we continued to [73] grant them at a later date.

Q. You continued to grant them at a later date?

A. In December, I believe, we have a record that we did.

Mr. Buchalter: That record wasn't produced this morning. Do you have that, Mr. Thorpe?

Mr. Thorpe: I believe so. Yes; they are here.

Mr. Buchalter: Were there any overdrafts in December?

Mr. Thorpe: Yes.

Mr. Buchalter: How much?

Mr. Thorpe: On December 8, there was \$541.72; on December 11, there was \$13. That is all that I see here, counsel.

Mr. Buchalter: Thank you.

Q. Now, isn't it true, Mr. Duval, that Mrs. Jones was told the bank would no longer honor any overdrafts?      A. No, sir.

(Testimony of Robert R. Duval.)

Q. When you looked at Plaintiff's Exhibit 2 in August, or in September, rather, of 1947, did you compare it with the statement which was in your file, dated March, 1947?

A. I don't remember, sir.

Q. Did you notice that the tax claims were as large if not larger than they were some six months before that?      A. No, sir.

Q. Did you notice that the accounts payable were substantially [74] larger in this statement than they were in the previous statement?

A. I can't answer that question, sir; I don't remember.

Q. As a matter of fact, do you remember comparing the statements at all?      A. No, sir.

Q. That statement was left with you or a copy of it?

A. Just for, I believe, one day or so.

Q. Now, you testified a few moments ago that the only conversations you had with Mrs. Jones were with reference to temporary difficulties. Can you tell me approximately when those conversations took place and what the substance of the conversations was?

A. I couldn't, sir. I had numerous conversations with Mrs. Jones from the time I became manager until approximately the time she requested this additional loan.

Q. And at that time she had a number of let us call them temporary difficulties that you discussed with her, is that right?

(Testimony of Robert R. Duval.)

A. I don't believe a number. The main thing we discussed probably was her loan or something like that.

Q. How did this question of temporary difficulties arise and how often?

A. Ordinarily, when she might want a temporary overdraft for a couple of days or so. [75]

Q. Do you know how many stores had been sold from August, 1947, until December, 1947?

A. No, sir.

Q. Do you know how many were finally sold at the time she went bankrupt? A. No, sir.

Q. Did you ever ask her whether she was selling any of the stores and, if so, what happened to the money? A. No, sir.

Mr. Buchalter: No further questions.

Mr. Thorpe: No further questions. The defendant rests.

Mr. Buchalter: No further evidence, your Honor.

The Court: Proceed with the arguments.

Mr. Buchalter: Your Honor, as you so well know, Section 60-a of the Bankruptcy Act defines as follows:

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, . . . which will enable such creditor to

obtain a greater percentage of his debt than some other creditor of the same class.”

Section 60(b) of the Bankruptcy Act states that “such preference may be avoided by the trustee if the creditor receiving [76] it or to be benefitted thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

I believe that the issues were materially narrowed down by the pleadings. The defendant admitted by his answer the transfer of the property; that it was upon an antecedent debt to a creditor and that it was made four months before the petition in bankruptcy.

The only questions, then, to be decided, are the question of whether it enabled the creditor to receive a greater percentage than another creditor of the same class, whether the bankrupt was insolvent at the time, and whether or not the creditor had a reasonable cause to believe that the debtor was insolvent at the time of the transfer.

Your Honor, first, I would like to briefly discuss the testimony which was given. We have the testimony of Mr. Duval, the manager of the bank, to the effect that there was a loan which was in existence at the time he took over the managership of this branch and that it was renewed at various periods of time. And we shall show by a case cited later on this particular set of circumstances has been shown from which we can infer that the creditor had reasonable cause to believe or that he had knowledge of certain facts. Mr. Duval stated

that he couldn't make this loan and that Mrs. [77] Jones was sent to the main branch. He had been renewing these notes right along. She hadn't made payment even on a debt of \$2,000. She hadn't paid anything on this debt of \$2,000, and it is questionable why he even considered a loan of \$12,000. I mean why, under those circumstances, he even gave it any thought. It seems very illogical to even think of that. What he did was to send this particular person to the main branch. We contend, your Honor, and we submit for your consideration that he believed and he knew she wasn't going to get a loan, particularly when she had a loan in existence, at the bank and an unpaid note which she hadn't been able to pay in part. And we submit that was merely for the purpose of passing it on to a higher-up when he knew she would be refused, but didn't want to refuse her himself at the branch at which she was dealing. His own testimony was to the effect that he often honored overdrafts. He testified to that on direct examination under Section 21(j). He testified that *there* were many overdrafts. There is testimony to the effect that, in October, the overdrafts reached the amount of \$5,000. Then they stopped. And, in December, there was some testimony of a small overdraft. There was also testimony to the effect that the balance that he had, or that Mrs. Jones had, was approximately \$100 during the month of November, I believe it was. I think that that certainly put the creditor on notice that there was something [78] wrong, certainly. And he, certainly, must have known,

considering the fact that he knew that all deposits were handled through this branch, her liquid position. He didn't know the extent of her assets. He didn't know if the stores were worth \$1,000, \$2,000, \$3,000 or only \$500, but it was incumbent upon him as a bank manager and as a business man to inquire into that. As far as cash goes, he knew she couldn't make these payments. The records were right at his disposal. And he didn't inquire into any other facts. He also has testified that he never discussed the condition of her business or her financial affairs. It is very unusual for a bank manager of a bank, which was a creditor to the extent of \$2,000, never to even discuss her financial affairs and yet grant these renewals as they went along. There must have been some discussion and some reason why she wanted the renewals. She just certainly didn't go in and say, "I want a renewal," and he say, "That is all right." We submit, your Honor, that there was testimony and there was conversation to the effect that Mrs. Jones was in a very distressing financial condition and that there was no other thing for him to do but to keep on playing along with her, hoping she would be able to sell some of the stores and raise enough money at least to pay the bank. He wasn't interested in anything else but that \$2,000 note which the bank had taken from her and for which it had loaned her the money. He saw a balance sheet in August, [79] 1947. He didn't take a copy of it. He merely looked at it. He knew the situation after that because, in September and October, she had



overdrafts. So he knew she was in trouble there and, still, he didn't ask for a financial statement after that, or in December, when she made payments, or in January, when she made the bulk of the payment of \$1,450. There is testimony to the effect that he suggested that she sell some stores. Of course, that was the only way that he could get his money. That was the only possibility of him getting any money. He knew, her cash position being as it was, that she couldn't pay this note. So he had induced her in some way to sell these stores. He also testified he knew some of the stores were losing and, still, he didn't ask for a financial statement after August, 1947.

We submit, your Honor, that, if a creditor is negligent in any way or the policy of his business is such that he doesn't feel that it is necessary to get financial statements or that it is necessary to make further inquiry as to the debtor's affairs, that is not the consideration; that what must be considered is what he should have done as a reasonably prudent man.

In the case of *Canright vs. General Finance Corporation*, Eastern District of Illinois, 35 Fed. Supp. 841, the court states, "Defendant was charged with what it learned or should have learned as a reasonably prudent business man, through its [80] representatives in their three days' visit in Momence. Failure to investigate will afford no excuse when the creditor's knowledge and information are sufficient to have put an ordinary busi-

ness man on inquiry. It is not a question of actual belief. Rather, the test is the belief that ought reasonably to be entertained under the facts known—the inference which an ordinarily intelligent business man would draw from the facts which he would discover if he made inquiry. Defendant could not close its eyes to known or obvious facts, or to facts which it could have ascertained, by making the inquiry, of a reasonably prudent business man. It was bound to make real inquiry, that is, such an investigation as a reasonably prudent and honest business man would have made under the circumstances known.”

Here they are discussing a reasonably prudent business man. Here is more than a reasonably prudent business man. I think he is charged with a greater knowledge because he is a banker and it is a bank's business to make loans. And he should have certainly inquired when he saw this shaky state of affairs, and that is an understatement, I might say, that it was shaky.

In another case, *Buchanan State Bank vs. DeGroot*, 39 Fed. (2d) 397, the court stated, “The testimony shows that the bank had carried loans for Ross for some time, knew that a considerable part of his debt was due to an unprofitable [81] transaction in stock in a refrigerator company; that he had drawn checks without funds to meet them, and while he owned two confectionary stores, one in Buchanan and the other in Three Oaks, both were heavily encumbered, and in the second he had consistently lost the profits of the first. He

sold the one in Buchanan, but used none of the proceeds to reduce the bank loans.”

We have the same situation here. She sold the store and didn’t reduce the loan.

“The bank knew that at least one creditor in substantial amount was unable to collect its claim against Ross. It was urging him to have a relative endorse its notes, and had secured a verbal statement of the bankrupt’s debts. In addition to the \$3,000 real estate mortgage, there was also a chattel mortgage of \$2,800 on the Three Oaks store of which the bank knew, and the bankrupt had told the cashier that this store was costing all that the Buchanan store made. In short, it evidently knew all about the unpromising character of the bankrupt’s business and his failing circumstances. The only circumstance of importance in the bank’s favor is its release of Miller as endorser on the \$750 note. Before the referee no explanation was given of this, the cashier simply saying that Miller was responsible and they had released him ‘which perhaps we should not have done.’ The inference is open that this was either due to the willingness [82] of the bank to do a favor to his director, or to the unwillingness of Ross to turn over a \$3,000 mortgage to secure his debts unless his note to Miller was included; the chance that Ross would go into bankruptcy and the transaction be avoided as a preference.”

In the case of *Boston National Bank vs. Early*, 17 Fed. (2d) 691, which I think is a leading case, the court said, “The president of the bank knew

upon September 30, 1924, that the balances of the bankrupt were far below those required. The original loan had been carried for more than two years, the notes given for it being renewed from time to time, and upon this date the bank was unwilling to renew the note of \$3,500, which then fell due, without assurances that larger balances would be maintained by the bankrupt.

“The statement of the bankrupt’s account showed decreasing deposits after that date. Checks were held as overdrafts in order to secure payment of the note. These facts should have put creditors upon inquiry, which would have showed that the company was bankrupt.”

And we have many other cases, your Honor, which bear out that particular thought, that it is not the actual belief which a creditor has but it is what he should know, and, when he learns certain things which put him on inquiry, he is supposed to proceed further and it is incumbent upon him to proceed further and find out what is the actual situation with [83] that particular debtor, not just to allow it to ride, not to ask for financial statements or any other information.

As to the question of insolvency, your Honor, I submit the case of *Abdo, et al., vs. Townshend, et al.*, 282 Fed. 476, which states, briefly, evidence may be admitted as to the indebtedness of the bankrupt prior to the filing of the petition.

The Court: What was the indebtedness of the bankrupt at the time the petition was filed?

Mr. Buchalter: At the time the petition was filed?

The Court: Yes; in bankruptcy.

Mr. Buchalter: I believe it was \$39,000, your Honor.

The Court: What were the assets?

Mr. Buchalter: The assets, according to the appraisal, were \$9,900.

The Court: That consisted of these stores?

Mr. Buchalter: Yes; the fixtures of the business and the inventory of these stores.

Also, as to insolvency, the case of *Rosenberg vs. Semple*, 257 Fed. 72, states: "Insolvency may . . ., and in many cases must, be proved by proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred."

Now, your Honor, I believe that the trustee has certainly borne any burden which he had to bear in this case; that he showed that the bankrupt was insolvent at the time; that he [84] showed that this particular creditor received a greater percentage of his debt than other creditors of the same class, and I think, beyond question, he showed that this particular creditor had a reasonable cause to believe that this debtor was insolvent. I think all of the facts point to that and we believe, your Honor, that the judgment should be for the plaintiff.

Mr. Thorpe: If the Court please, insolvency, within the meaning of the Bankruptcy Act here, is defined as follows:

"A person is deemed to be insolvent within the provisions of the Bankruptcy Act whenever the aggregate of his property, exclusive of any prop-



erty which he may have conveyed, transferred, concealed, removed or permitted to be concealed or removed, with intent to defraud, hinder or delay creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

If the Court please, there has been a financial statement or balance sheet submitted to the Court here in the evidence of the plaintiff, Plaintiff's Exhibit No. 2. It is said that that financial statement was presented, to an agent of the bank, either in August or September of 1947. That showed a net worth of nineteen thousand odd dollars. The evidence also shows that the bank never saw any later statement of the business of the bankrupt here. The only evidence that has been presented by the plaintiff as to whether or not [85] this bankrupt was actually insolvent at the time these transfers were made, or these payments were made to the bank, is the introduction of an appraisal in the bankruptcy proceeding itself. The bankruptcy proceedings were initiated, as shown by the complaint, on or about March 5, 1948. Therefore, it is submitted by the defendant here that there is no proof at all before this Court as to whether or not this bankrupt was actually insolvent, within the meaning of the Bankruptcy Act, at the time these payments were made.

It was incumbent upon the plaintiff to prove every element of a preference under the Bankruptcy Act and it is respectfully submitted to this Court that the plaintiff has failed to prove that the bankrupt was insolvent at the time these pay-



ments were made. That is the first position of this defendant.

The second position is that there is nothing in the evidence here to show that this defendant had knowledge of anything that would put a reasonable man upon inquiry to determine further facts. In August, defendant saw a financial statement showing a net worth of nineteen thousand odd dollars. The note was paid. The last payment was made to the defendant in January of the following year. It couldn't possibly have been more than five months later than then. It is true that the bank carried overdrafts for this bankrupt but the testimony before the Court shows that this was done frequently [86] and, also, shows why it was done. This bankrupt here maintained 16 shops and she did business with the bank closest to her at the time. Then she would subsequently transfer these funds to this account in the Melrose and Highland branch of the Security-First National Bank. We respectfully submit, your Honor, that there isn't anything here to put the bank upon inquiry which would require them to make any investigation. The plaintiff here certainly has not sustained the burden of proof in that respect, it seems to me. The cases on the subject even go so far as to say, even if one had a suspicion that a person was insolvent, they would still not be liable under the bankruptcy preference provisions.

The case of *McDougal vs. Central Union Conference Association*, reported in 110 Fed. (2d) at page 939, states, in part, as follows:

“Temporary failure of debtor to discharge his obligations promptly is not in itself sufficient to prove that creditor who is aware of such default has ‘reasonable cause to believe’ that it was intended to give preference by transfer to creditor.

“As respects provisions of the Bankruptcy Act making preference voidable if creditor has ‘reasonable cause to believe’ that preference will be effective, ‘reasonable cause to suspect’ does not have the same meaning as ‘reasonable cause to believe’ and the latter is not proved by circumstances [87] that would merely excite suspicion.”

Now, if the Court please, in the matter before the Court here, we respectfully submit that there is not even enough before the Court that would mean that anyone’s suspicion was excited, let alone reasonable cause to believe.

The case of *Lee vs. State Bank & Trust Co.*, reported in 38 Fed. (2d) 45, holds the same thing, that a mere suspicion that a bankrupt might be in trouble financially and might be insolvent within the meaning of the Bankruptcy Act is not sufficient to prove that it had reasonable cause to believe.

The cases cited by the plaintiff here assume, first, that the creditor who has been paid on an antecedent debt is already in possession of knowledge that makes his act practically a fraud on the other creditors. They assume that he already knew enough that would compel him to go further and learn more. But, surely, if the Court please, we don’t have that situation here. Nowhere in the evidence here is it said at all that the bank was

in possession of anything relative to the affairs of this bankrupt except that it did extend some overdrafts and they did talk about working capital and that two stores out of 16 were not doing well. We submit, if the Court please, that that is entirely insufficient to charge the defendant here with knowledge of anything that would put it upon inquiry.

The Court: What was the total amount of the indebtedness [88] of all the creditors, in January, 1948, when this payment was made to your bank?

Mr. Thorpe: There is no evidence before the Court on that subject, your Honor.

The Court: As adjudicated in the bankrupt Court, what was the total amount?

Mr. Thorpe: I think, as I recall, when the schedules were filed, the schedules listed some \$39,000, I believe.

The Court: That is now due the creditors?

Mr. Thorpe: Yes, your Honor. If I recall correctly, that is the figure.

The Court: Fourteen stores remained in the schedules at the time the petition was filed?

Mr. Buchalter: Nine were left, sold by the trustee in bankruptcy.

The Court: Is there any evidence as to what was the value of those nine?

Mr. Buchalter: Yes. It was \$9,900, as shown by the report of the appointed appraiser, Mr. Bodkin, of the Bankruptcy Court, and it was sold for \$5,100.

The Court: A \$39,000 indebtedness, is that right?

Mr. Buchalter: That is right.

Mr. Thorpe: If the Court please, I think I have covered the position of the defendant here and we will submit the matter to the Court. [89]

The Court: In January, 1948, when they claim this preference was granted to the bank, were these stores losing or gaining or holding their own?

Mr. Thorpe: I think they were operating in January, 1948.

The Court: How many of them were operating?

Mr. Thorpe: How many were operating, Mrs. Jones?

Mr. Buchalter: Nine.

Mrs. Jones: Nine. Well, I am not sure.

Mr. Buchalter: Nine were operating, your Honor.

Mrs. Jones: I am not sure about the number. Well, there were 10.

Mr. Buchalter: If the Court please, I would just like to make a few comments with reference to the argument of counsel. The financial statement, which is Plaintiff's Exhibit 2, introduced into evidence, we introduced for this purpose, your Honor. It shows on it a net worth of \$19,000 and it is upon that statement that the bank refused any further loans. We contend, as a result of the examination by Mr. Duval, they knew or should have known that this woman was insolvent for this reason, that they had a previous statement in March, 1947, and a comparison of the two statements distinctly shows that this woman, the bankrupt, had lost considerable money. In addition, none

of the liabilities had decreased substantially and, as a matter of fact, if anything, [90] some of them had increased.

With reference to that particular statement, we feel, your Honor, that it alone is sufficient to put a banker, who certainly should be a reasonable and prudent man, upon notice that something is wrong and, under the cases cited, they were bound to inquire.

With reference to the question of whether or not the plaintiff has proven insolvency, the bankrupt, herself, testified that there was no substantial change of any kind between her assets, that were surrendered to the receiver in bankruptcy, in March and December or January, a few months previous thereto; and those assets, as a matter of record, are before this Court having an appraised value of some ninety-seven or ninety-nine hundred dollars. And, if there wasn't any change in the value of those assets, and the debts are some \$39,000, I submit, your Honor, that it is an insolvent business within the meaning of the Bankruptcy Act. And, by the way, those assets were finally sold by the Bankruptcy Court for some \$5,100 and that \$5,100 must be used for the payment of fees and the expenses of administration and the payment of taxes, and there can be no question that the unsecured creditors are going to receive nothing. So that the unsecured creditors, which are in the same class as the Security Bank, are going to receive nothing, whereas the Security Bank received 100 per cent. [91]



I would like to call this further statement to your Honor's attention, as pointed out by counsel. He says that these overdrafts were just a situation which arose because of the fact that there was branch banking done and this woman would say, "I have got so much in this bank and that bank and allow my overdraft." Mr. Duval testified that these overdrafts had been running all through the year of 1947. I submit, your Honor, that it was impossible to have conducted that business any further without any further overdrafts and, in November, 1947, there was not one single overdraft and, in December, there were two, one of them for, I think, \$500, and one for \$13. The bank knew, in December and in November, that this account was very dangerous and, if they didn't know it, they certainly, in our opinion, should have known it.

The case of McDougal cited by Mr. Thorpe is a case in which the Court held that the mere fact that a man has a temporary inability, standing by itself, to pay a note, is not sufficient to come within the meaning of Sections 60(a) and (b) of the Bankruptcy Act. I don't quarrel with that law but in that case there was only temporary inability to pay. In this case it is not temporary. This note was made in January and there were three or four renewals, with a weekly payment plan which had failed, and all kinds of advice was given about selling stores and borrowing new money for capital.

The Court: In January, 1947, the note was made, was it?

Mr. Buchalter: In January, 1947, the original note was made.



The Court: And it ran a year before it was finally paid?

Mr. Buchalter: A year and a few days.

The Court: How was it paid?

Mr. Buchalter: The bankrupt had 16 stores, one of them in San Bernardino, and you will recall her testimony that she sold the store and received from a Mr. Coryell, who was the buyer in San Bernardino, a \$1400 cashier's check, outside of escrow; that she took that \$1400 check; didn't deposit it in her account, but she endorsed that check over to the Security Bank as a partial payment.

Mr. Duval was very frank and he says she had 16 stores and he told her to sell some of them. And, yet, your Honor, he never made it his business to find out, from August, 1947, to January, that some of the stores had been liquidated and sold because, in January, all she had left was 10 stores. One she sold in San Bernardino but concerning the other five or six stores he never even asked. I submit, your Honor, that, in my opinion, violates the law and that that gave them a duty. They were certainly under a duty to investigate the facts and then they would have known or certainly they would have had reasonable cause to believe that this debtor was insolvent. [93]

The laws have been becoming more liberal as time goes by. In 1938, when the Chandler Act was adopted, Section 60(b) was very much liberalized and, as a matter of fact, with the trend today, in my opinion, Section 60(b) will eventually be com-

pletely eliminated, so that it will not even be necessary to show reasonable cause.

The facts in this case, in my opinion, come squarely within the provisions of Sections 60(a) and 60(b) of the Bankruptcy Act.

This was, undoubtedly, in my opinion, a preference and a preference may be proven not by a specific showing of fact but may be proven by the surrounding circumstances. Otherwise, the Court can readily realize it would be practically impossible for a trustee in bankruptcy to show all of the facts.

The Court: Will you call my attention to those provisions of the Act again and read them?

Mr. Buchalter: Sections 60(a) and 60(b) of the Bankruptcy Act?

The Court: Read them if you have them there.

Mr. Buchalter: I am reading Section 60(a).

“A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four [94] months before the filing by or against him of the petition in bankruptcy, or of the original petition under Chapter X, XI, XII or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.”

The rest of the Section is of no effect here.

“(b) Any such preference may be avoided by the trustee if the creditor receiving it or to be

benefitted thereby or by his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.”

I think that the plaintiff has definitely shown, together with the admissions in the pleadings, everything that comes within that Section and that, therefore, the judgment of this Court should be for the trustee in bankruptcy. [95]

The Court: You have here a case, which is nothing unusual under this Bankruptcy Act, which presents to the Court somewhat confusing circumstances as to the activity of the bankrupt and her creditors. I realize that the principle governing the proof rests upon the trustee, who claims a preference, to show that the creditor that he claims was preferred under the Act had knowledge or had reasonable grounds to believe that the bankrupt was insolvent at the time the preference was made and that it was made within the four months provided therein. The Court is confronted with that provision of law in analyzing the testimony, as to whether the evidence and circumstances warrant the conclusion that the preferred creditor had reason to believe during the existence of this indebtedness that the bankrupt was insolvent or unable to pay all of her creditors.

The purpose of the Act is, of course, that all creditors of a bankrupt, under that statute, shall be treated alike, that is, what is left of the bankrupt property shall be apportioned according to the per cent of their indebtedness. That is the purpose of the Act.

We have here a set of circumstances, where the bankrupt executed this note in question to the bank in January, 1947, and it existed as a debt until January, 1948, when it was finally paid in full by the bankrupt to the bank, which was within a few months of the bankruptcy proceedings and within [96] the four-month period mentioned in the Act. This indebtedness continued along during that year. It was renewed, in a sense, from time to time. And the bank had overdrafts during that time that were recognized and paid by the bank.

The bank, no doubt, as bankers do, had the right to keep advised as to the status of whoever owed it. They have the right and they do financially realize on their debts as soon as they can. But it seems that this bank went along during this year and was very kind and considerate of this bankrupt and continued such conduct until the payment of this note in January, 1948.

This bankrupt had a number of stores, starting out, I believe, with 16, and it gradually dwindled down to nine. The bankrupt disposed of those for the purpose, no doubt, of paying the bankrupt's indebtedness to her creditors, \$1400 of which was paid on this note. It seems to me, from all this testimony of the meetings and dealings of the bankrupt with the bank, that the bank, no doubt, had some information of the inability of the bankrupt to pay that note. It extended it from time to time and allowed overdrafts, realizing, no doubt, the financial condition of the bankrupt. Otherwise, that note would have been paid before that.

The rule seems to be, under this Act, that, if a preferred creditor has knowledge or has reason to believe that a bankrupt is insolvent, that Act steps in and it must be [97] placed in force. Did this bank have reason to believe that this bankrupt was insolvent by all of these transactions during that year, extending the note and overdrafts and carrying this bankrupt along in the business of some 16 stores, which dwindled down to nine? It is not fair to conclude that the bank didn't have an idea of what was going on as to her inability to pay this note during that time, when it kept extending it. Of course, they did. Bankers have to know and they have a right to know and it is their place to know. When you want to renew a note when it becomes due, the bank wants to know why it isn't paid or why you ask for an extension. They make the initial investigation. It is the bank's place to do it. They had reason to believe what the financial condition of this bankrupt was during that year from all of these transactions between the bankrupt and the bank. That is apparent. They had reason to believe that until the store was sold in January, 1948, and she paid up the balance to this bank and the other creditors took what was left. That is the situation. That is apparent and clear from this evidence. The bank was paid in full out of the sale of a store in January, 1948, which was a clear preference granted to that one creditor. I can't reason any other way. The other creditors took their chances and, as you say, they got nothing. The bank has been preferred. The pur-



pose of the Bankruptcy Act is to prevent a preference being granted to [98] creditors of equality.

To my mind, the evidence in this case presents a picture that the bank here had reason to believe that this bankrupt was, during that time, unable to pay until this one store was sold in January, 1948, and part of the proceeds was applied on that debt in preference to all the other creditors, creditors to the extent of some \$39,000. I can't reason any other way but that the prayer of this petition should be granted and a preference is declared.

From the proceedings before the Bankruptcy Court and the schedules and the dealings between the bankrupt and this bank, I can't reach any other conclusion than that the bank had an opportunity to reasonably believe that this bankrupt was unable to pay this debt until it was cleaned up, in January, 1948, by the sale of one store, and that that payment occurred within four months of the date of the filing of the petition in bankruptcy.

You may prepare findings and a decree in line with what the Court has expressed and in accordance with the prayer of the complaint. [99]

#### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates speci-



fied therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of November, A. D., 1948.

/s/ ROSS REYNOLDS,  
Official Reporter.

[Endorsed]: Filed Dec. 2, 1948.

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[Endorsed]: No. 12147. United States Court of Appeals for the Ninth Circuit. Security-First National Bank of Los Angeles, a national banking association, Appellant, vs. Francis F. Quittner, as Trustee in Bankruptcy of the Estate of Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 8, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit

No. 12147

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the Estate of Alvera Gordon Jones, doing business as LeRoy Gordon Beauty Salons,

Plaintiff and Appellee,

vs.

SECURITY-FIRST NATIONAL BANK OF  
LOS ANGELES, a National Banking Association,

Defendant and Appellant.

APPELLANT'S STATEMENT OF POINTS  
UPON WHICH IT INTENDS TO RELY ON  
APPEAL

To Paul P. O'Brien, Clerk of the above-entitled Court:

Comes now the above-named Appellant, and in connection with the above-entitled appeal hereby sets forth the points upon which it intends to rely on appeal:

1. That Plaintiff failed to sustain the burden of proof which was upon him to prove every element of a preference under the Bankruptcy Act.

2. That the evidence fails to sustain the finding that Defendant was in possession of sufficient facts concerning the bankrupt's business as would give it reasonable cause to believe that the bankrupt was insolvent.

3. That the evidence fails to sustain the finding that at the time of the payments to Defendant made by bankrupt the fair valuation of the aggregate of her property was not sufficient in amount to pay her debts.

The entire record as certified to you must be printed in its entirety as the above issues of law and fact are framed by the pleadings, evidence and judgment in that record.

Dated January 15, 1949.

/s/ ROANE THORPE,  
Attorney for Defendant and Appellant.

[Endorsed]: Filed January 17, 1948. Paul P. O'Brien, Clerk.



No. 12147

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the  
Estate of Alvera Gordon Jones, doing business as Le-  
Roy Gordon Beauty Salons,

*Appellee,*

*vs.*

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a  
National Banking Association,

*Appellant.*

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

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APPELLANT'S OPENING BRIEF.

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FILED

MAR - 3 1949

PAUL P. O'BRIEN,

ROANE THORPE,  
215 West Sixth Street, Los Angeles 14,  
*Attorney for Appellant.*





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No. 12147

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the  
Estate of Alvera Gordon Jones, doing business as Le-  
Roy Gordon Beauty Salons,

*Appellee,*

*vs.*

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a  
National Banking Association,

*Appellant.*

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## APPELLANT'S OPENING BRIEF.

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### Statement of Pleadings and Evidence.

This is an appeal by Defendant from a judgment in favor of Plaintiff in the sum of \$1,650.00 with interest thereon at the rate of 7% per annum from July 16, 1948.

The pertinent allegations of the Complaint [R. 2-4] are:

That within four months before the filing of the petition in bankruptcy the bankrupt paid and transferred to the Defendant sums totaling \$1,650.00; that these payments were made on account of an antecedent debt owed by the bankrupt and were made while the bankrupt was insolvent, thus enabling the Defendant to obtain a greater percentage of its debt than other creditors of its class;

and that, at the time of the payments the Defendant had reasonable cause to believe that the bankrupt was insolvent, and that said transfers would effect a preference.

The Answer of the Defendant [R. 4-7] denies that it ever obtained any preferential interest by reason of any matters or things set forth in the Complaint; denies, for lack of knowledge, information, or belief, that the payments were made or suffered by the bankrupt while the bankrupt was insolvent; denies, for lack of knowledge, information, or belief, that the effect of the payments was to enable it to obtain a greater percentage of its debt than other creditors of the same class; and denies positively that at the time of the transfers or payments it had reasonable cause to believe that the bankrupt was insolvent, and that the transfers would effect a preference. It also denies that the sums received by it constitute property belonging to the Plaintiff Trustee.

The evidence of Robert R. Duval, Manager of the Melrose and Highland Branch of Defendant, a witness called on behalf of the Trustee in Bankruptcy under Section 21(j) of the Bankruptcy Act, shows the following:

Defendant loaned to Alvera Gordon Jones \$2,000.00 on January 6, 1947, on a promissory note due in ninety days. On April 30, 1947, this note was renewed for an additional ninety days [R. 35]. On July 30, 1947, this note was again renewed for sixty days [R. 36]. On October 22, 1947, there was a payment made on this note of \$250.00; a second payment of \$100.00 on October 31, 1947; a third payment of \$150.00 on December 2, 1947; so that on December 3, 1947, there was a balance due on this note of \$1,500.00, and the note was then renewed for ninety days. On December 18, 1947, \$50.00 was paid

thereon, and on January 23, 1948, the note was paid in full [R. 37].

Mrs. Jones had been a good customer of the Defendant for some time. The Defendant had financial statements in its records, the latest one of which was obtained March 31, 1947 [R. 38]; and it received no financial statements after March 31, 1947 [R. 39]. During the summer of 1947 some time Mrs. Jones asked for additional funds, and presented to Defendant a statement which she took back with her after Defendant looked at it. This statement showed that she had a net worth [R. 39].

On July 30, 1947, Defendant had a conversation with Mrs. Jones with reference to the payment of the note; and she requested additional time in which to pay it off, stating that she had taxes that she wanted to meet at that time [R. 40]. Between September 30 and December 6, 1947, Defendant had conversations with Mrs. Jones, and during one of these conversations she requested more money and submitted certain figures to the Defendant [R. 41]. She was told that Defendant should first be paid off before it considered additional loans, and at the same time she was given the names of outside loan companies who would probably be interested in her deal [R. 42]. In October, November, and the early part of December, 1947, she was advised to sell some of her beauty shops by Defendant in order to get in a better position [R. 43]. During the entire period of the loan involved Mrs. Jones was overdrawn many times, and Defendant honored the overdrafts [R. 44]. These overdrafts arose as follows: Mrs. Jones had approximately sixteen shops, in which she generally carried individual bank accounts wherever it might be convenient to the beauty shop, and about once a

week her manager would send in duplicate deposit tickets showing how much she had deposited in these various bank accounts, and upon those deposit tickets she would draw a check, which she would deposit in her main account, where the overdrafts arose. Thus Defendant would be willing to go ahead and grant temporary overdrafts, as it knew the money was coming through [R. 87]. A few times checks were returned for insufficient funds [R. 44].

In the summer of 1947 Defendant knew that Mrs. Jones was probably losing money on a couple of her shops [R. 49], and it understood she had about sixteen. It was told that she was making money on the rest of them [R. 49]. In August, 1947, when Mrs. Jones submitted figures, Defendant was shown a regular audit, and this audit showed a net worth at that time [R. 49-50]. The only financial difficulties Mrs. Jones ever discussed with Defendant would be temporary ones, in which she needed temporary working capital for a temporary period; and no conversation was ever had with her relative to whether her business was in an financially sound condition or otherwise [R. 87]. Plaintiff's Exhibit 2 [R. 15-24] was shown Mr. Duval, and he identified it as the financial statement or balance sheet that was presented to him by Mrs. Jones [R. 88]. This was the last financial statement or balance sheet Defendant ever saw [R. 89], and showed a net worth of \$19,450.35 [Testimony of Austin H. Ellis, R. 56].

The policy of Defendant was that, although it might have an understanding with a customer that it might extend him credit for a year's time, still a note would ordinarily be written for from sixty to ninety days, with the



understanding that it would take a look at it at that time and, if it felt satisfied with the customer's position, would grant him an additional period of time on the note. There was nothing unusual about renewing the note for Mrs. Jones, and that happened any number of times within the bank, the granting of renewals when it felt justified [R. 89-90]; and one of the main reasons for granting the renewals of the note to Mrs. Jones was that Mrs. Jones was going to dispose of some of her stores, and Defendant felt that by disposing of those she would have sufficient working capital and sufficient funds to pay off the bank when she found suitable buyers [R. 91].

Mr. Austin H. Ellis, the public accountant who testified on behalf of the Trustee in Bankruptcy, testified that the statement prepared by him in August, 1947 [R. 52], and introduced as Plaintiff's Exhibit 2, showed a net worth of \$19,450.35, as heretofore stated. This statement was dated August 31, 1947 [R. 59]. He was questioned on direct examination as to various figures in this statement [R. 50-59].

The testimony of Alvera Gordon Jones, a witness called on behalf of the Trustee in Bankruptcy under Section 21(j) of the Bankruptcy Act, shows:

That she did business under the name of Leroy Gordon Beauty Salons; that in 1948 she sold a store in San Bernardino [R. 60]; and that with at least \$1,400.00 of the proceeds she paid the note she then owed to the Defendant [R. 61-62].

She testified as to the renewals of the note [R. 64-65], and that she showed Plaintiff's Exhibit 2 to Mr. Duval and requested a loan [R. 66]. She stated that in December,

1947, she had a conversation with Mr. Duval in which he stated he would have to have a renewal on the note, and on a demand basis not to exceed ninety days; that she had a discussion with Mr. Duval at that time, and he knew she was having financial difficulties because she had not been able to pay the \$2,000.00 on a monthly basis [R. 68-69]; that Mr. Duval knew she was losing money right along [R. 70]; that she had conversations with Mr. Duval which she didn't remember; that she was in and out of the bank every day; that she didn't always stop to talk with Mr. Duval, but he always asked her how the business was going, and she always said, "We are doing fine; we are getting along grand"; that she may have said that some of the stores were not making money [R. 72]. That Mr. Duval spoke about the note, that it had been renewed several times and he was concerned about it; that she told him if she could sell the store, and when she did sell it she would take care of the loan, and that the understanding was that she would do so as quickly as she could [R. 73]. That she didn't believe she told Mr. Duval at the time of the renewal of the note that she would sell the store or any one of them for that purpose; it was understood that she would sell those stores, not just to dispose of them, but to sell them wisely, to be able to take care of not only the obligation with the Security, but with the creditors, and she believed the creditors understood that, too. She had conversations with reference to selling the stores over a period of time while she was attempting to work out a betterment of the situation of disposing of the stores that were not paying, and having that amount of capital to use for other purposes. This was during the latter part of 1947 [R. 74].

She was asked the question as to whether or not, at the time she was turned down for an additional loan, she told Mr. Duval that conditions were becoming so serious that it might be necessary for her to go into receivership [R. 75]. Former testimony given before the Referee in Bankruptcy was read to her, which she denied, and further stated that she did not believe she had ever said anything about receivership to Mr. Duval [R. 76]. She then stated that she was not well, and that she wanted to make some arrangement for her business so that she could have some time for herself for two or three months, but that it was not with the thought of going into bankruptcy or complete failure; and, if she ever had had a conversation with Mr. Duval, it was in that trend, and not the fact that she had completely failed and the business was gone [R. 76-77]. When asked the question as to whether or not she knew that her business was in severe financial difficulties, and that she was looking for some plan to try to work it out so that the bank and all of her creditors would have been paid in full, her answer was yes, that she told Mr. Duval she would like capital, and that she wanted capital to better her situation [R. 77]. Mrs. Jones did not file a voluntary petition in bankruptcy [R. 79].

On cross-examination Mrs. Jones was asked whether or not she had any conversation with Mr. Duval which would indicate to him that she was contemplating going into bankruptcy, or that she was insolvent, to which she replied, "No" [R. 82]. She was asked if Mr. Duval ever asked her if she were insolvent, or how she was getting along in her business, to which she replied that that question, "How are you getting on in your business?" is an every-day question; that she never went into lengths as to

what the problems were many times, she said that business was slow, or business was up; that she didn't believe she ever indicated to Mr. Duval that her business was insolvent [R. 82-83]. That when she went to the bank for the additional loan and presented the statement of August 31, 1947, to Mr. Duval, she wanted \$12,000.00, but that Mr. Duval told her the amount was more than he could lend from the Branch, and he would have to refer her to the Head Office, and that the Head Office told her that they did not make loans on beauty salons as such, and that that was the reason they referred her to a finance company; and that the loan was not turned down because of financial difficulties; that she had been overdrawn at the bank many times prior to October, 1947 [R. 84-85].

The three witnesses, Robert R. Duval, Austin H. Ellis, and Alvera Gordon Jones, were all of the witnesses who testified on the trial of the cause.

### Jurisdiction.

Jurisdiction of this appeal is conferred by Section 225(c) of Title 28, U. S. C. A., which includes "controversies, and cases had or brought in the district courts under Title 11, relating to bankruptcy, . . ." This jurisdiction is also conferred by Section 47a of Title 11, U. S. C. A. See also *Childs v. Ultramares Corp.* (Second Circuit), 40 F. 2d 474, at 477, where it is said:

" 'Controversies' are ordinary suits in equity or actions at law between the Trustee as such and adverse claimants of property; . . . "

### **Appellant's Specifications of Error.**

(1) As a matter of law, the District Court erred in holding that Plaintiff had sustained his burden of proof which was upon him to prove every element of a preference under the Bankruptcy Act, in that the proof of Plaintiff fails to show that the Defendant had reasonable cause to believe that the bankrupt was insolvent at the time of said transfers.

(2) The District Court erred in finding that Defendant was in possession of such facts concerning the bankrupt's business as would give it reasonable cause to believe that the bankrupt was insolvent.

### **Statement of Questions Involved.**

The two legal questions urged by Appellant here are:

(1) Did Plaintiff sustain the burden of proof which was upon him to prove every element of a preference under the Bankruptcy Act?

(2) Did the evidence sustain the Finding [Finding IX, R. 9] that Appellant was in possession of sufficient facts concerning the bankrupt's business as would give it reasonable cause to believe that the bankrupt was insolvent?



## ARGUMENT.

### POINT I.

#### Did Plaintiff Sustain the Burden of Proof Which Was Upon Him to Prove Every Element of a Preference Under the Bankruptcy Act?

One of the elements of a preference under Section 60a of the Bankruptcy Act is the making or suffering of a transfer of property by a debtor while insolvent. Subdivision b of Section 60 of the Bankruptcy Act provides that upon a proof of a preference it may be avoided by the Trustee upon showing that the creditor receiving or to be benefited by the preference had reasonable cause to believe that the debtor was insolvent. No avoidance of a preference can be had unless the transferee did have such reasonable cause to believe that the debtor was insolvent at the time of such transfer. The burden of proving the existence of all essential elements is upon the Trustee seeking to avoid the transfer. (*Anderson v. Stayton State Bank*, 82 Ore. 357; 38 American Bankruptcy Reports, 4; 159 Pacific, 1003.) The mere inability to meet current obligations is not insolvency in the bankruptcy sense, which is the excess of liabilities over assets at a fair valuation. (*Matter of Aughenbaugh*, 33 Fed. Supp. 671; *Cusick v. Second National Bank*, 115 Fed. Rep. Second Series, 150.)

It is respectfully urged by Appellant that Appellee did not sustain his burden of proof requiring him to establish that Appellant had reasonable grounds to believe that the bankrupt was insolvent at the time of the transfers.

The evidence of Mr. Duval shows that on January 6, 1947, Appellant loaned the bankrupt \$2,000.00 on an unsecured promissory note; that this note was renewed from



time to time until January 23, 1948, when it was paid in full; that the last financial statement obtained by Appellant was on March 31, 1947; that Appellant saw the statement prepared by the public accountant dated on or about August 31, 1947, and that that statement showed a net worth of \$19,450.35. There is no evidence that Appellant ever saw any statement or figures relative to the bankrupt's business after the statement aforesaid.

One of the main points of Appellee was that, because Appellant allowed the bankrupt overdrafts, this sustained the legal proposition that Appellant had reasonable grounds to believe the bankrupt was insolvent. But the evidence shows that the bankrupt operated approximately sixteen beauty salons, and that the money would be collected from these salons and then deposited in the bankrupt's account, and that Appellant understood the method of operation of the bankrupt and permitted these overdrafts as a customary thing, for the reasons stated. These overdrafts had been permitted in the early part of 1947 as well as in the latter part of the year.

The evidence also shows that it was customary for Appellant to renew customer's notes from time to time if it felt warranted. Could it be reasonably said that, if Appellant felt that the bankrupt would be unable to pay its note and would be unable to make good the overdrafts, Appellant would have permitted these things to go on? It is respectfully urged that the only reason Appellant did permit overdrafts and did renew the note was its belief in the solvency of the bankrupt. This would seem to be

the only logical explanation of Appellant's procedure in this matter.

Nowhere is the evidence of Mr. Duval contradicted; nor was the Appellee able to establish any knowledge on the part of Appellant that the bankrupt was in any financial difficulties other than that she was short of working capital, and that a few of her beauty salons were not making money and she was advised to sell them. Although Appellee endeavored to do so, he was unable to prove by Mr. Duval that Appellant ever told the bankrupt that she should go into receivership, or that the bankrupt ever told Mr. Duval that she thought she should go into receivership. The most that could be said is that the bankrupt never had enough working capital, but it is contended by Appellant that a shortage of working capital is certainly no proof of insolvency, nor is it a thing that would give anyone reasonable cause to believe that the bankrupt was insolvent within the meaning of the Bankruptcy law. Certainly, even if a person had reasonable cause to suspect that another was insolvent, or would be apprised of circumstances that would merely excite suspicion that someone was insolvent, this would be insufficient to prove a reasonable cause to believe. See *McDougal v. Central Union Conference Association of Seventh Day Adventists*, 110 Fed. Rep., Second Series, 939, wherein it is said in part as follows:

“Temporary failure of a debtor to discharge his obligations promptly when they fall due is not in

itself sufficient to prove that a creditor who is aware of such default has reasonable cause to believe that it was not intended to give a preference by means of a transfer which he obtains. . . . 'Reasonable cause to suspect' does not have the same meaning as 'reasonable cause to believe', and reasonable cause to believe that a transaction would constitute a preference is not proven by circumstances that would merely excite suspicion."

It is the position of Appellant that the last information it had of the financial condition of the bankrupt was that she had a net worth of over \$19,000.00, that she was somewhat short of working capital, and that she was going to sell a few of her shops to improve her liquid position from the standpoint of working capital; that the granting of overdrafts to the bankrupt was an habitual and customary thing, by reason of the number of her shops and the collection of her money into a central account, and that there was nothing unusual in renewing her loan; that the logical interpretation of the evidence is that, if Appellant had any cause at all to believe that the bankrupt was insolvent, it would not have continued to renew her loans, nor would it have permitted her overdrafts from time to time; and that the Trustee in Bankruptcy has utterly failed to sustain the burden of proof which is upon him to prove that Appellant had any reasonable cause or any cause at all to believe that the bankrupt was insolvent at the time of the transfers.

## POINT II.

**Did the Evidence Sustain the Finding [Finding IX, R. 9] That Appellant Was in Possession of Sufficient Facts Concerning the Bankrupt's Business as Would Give It Reasonable Cause to Believe That the Bankrupt Was Insolvent?**

As the evidence has been heretofore set out and discussed by Appellant, it will not take the time of the Court to reiterate it under this point; and, if Appellant believed that there was any substantial evidence at all to sustain Finding IX, it would not urge this point on this appeal, it being aware that, if there is substantial evidence to support a finding, the finding will not be disturbed by the appellate tribunal. But it is the position of Appellant here that there is no evidence of any substantial character whatever to support this Finding.

In the case of *Brookheim v. Greenbaum*, 225 Fed. Rep. 635, affirmed in 225 Fed. Rep. 763, it was held that, if the bankrupt was concededly unbusinesslike and slovenly in his business transactions, a failure to maintain his credit by prompt payments, and a shortness of cash and absence of free capital, continuing for a long period without insolvency, are not of themselves sufficient to put on inquiry all who deal with him.

In *Cusick v. Second National Bank*, 115 Fed. Rep., Second Series, 150, the Court declared:

“The nature of reasonable cause to believe a debtor insolvent was authoritatively defined by the Supreme Court in *Grant v. First National Bank* (97 U. S. 80, 24 L. Ed. 971) as follows:

“Some confusion exists in the cases as to the meaning of the phrase, “having reasonable cause to be-

lieve such a person is insolvent.” *Dicta* are not wanting which assume that it has the same meaning as if it had read, “having reasonable cause to suspect such a person is insolvent.” But the two phrases are distinct in meaning and effect. It is not enough that a creditor had some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor’s insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. *A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting.* Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

“The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know any thing of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding.



To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

“ ‘Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor’s insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man.’ (Italics supplied.)”

In the case of *Everett v. The Warfield Mining Co.*, 37 Fed. Rep., Second Series, 328, it is held that a creditor may feel anxious about his claim and have a strong desire to secure it or have it paid, and yet not have such belief as the Act requires.

In the case of *Matter of Florsheim*, 24 Fed. Supp. 991, it was held that financial statements given by a bankrupt to a bank are pertinent evidence as to whether the bank had reasonable cause for belief.

In the case of *Matter of Williams*, 35 American Bankruptcy Reports, New Series, 100, it was held that a bank’s knowledge that debtor’s checks had been returned for insufficient funds was insufficient to show reasonable cause to believe the debtor was insolvent.

The financial statement dated on or about August 31, 1947, shown to Appellant by the bankrupt, far from indicating insolvency, indicated the exact opposite. This state-



ment was prepared by a public accountant, not by the bankrupt; it was introduced into evidence by the Trustee in Bankruptcy himself. The overdrafts were a customary thing, and the reasons for them were given. There is no positive proof on the part of the Trustee in Bankruptcy that the bankrupt ever indicated to Appellant that she was in any worse financial situation than being short of working capital. There does not seem to be any conflict in the testimony; and it is the position of Appellant that there is no substantial evidence whatsoever to sustain the Finding aforesaid. It is contended that there is not even sufficient proof of any facts that would even cause anyone to suspect the insolvency of the bankrupt at the time of the transfers.

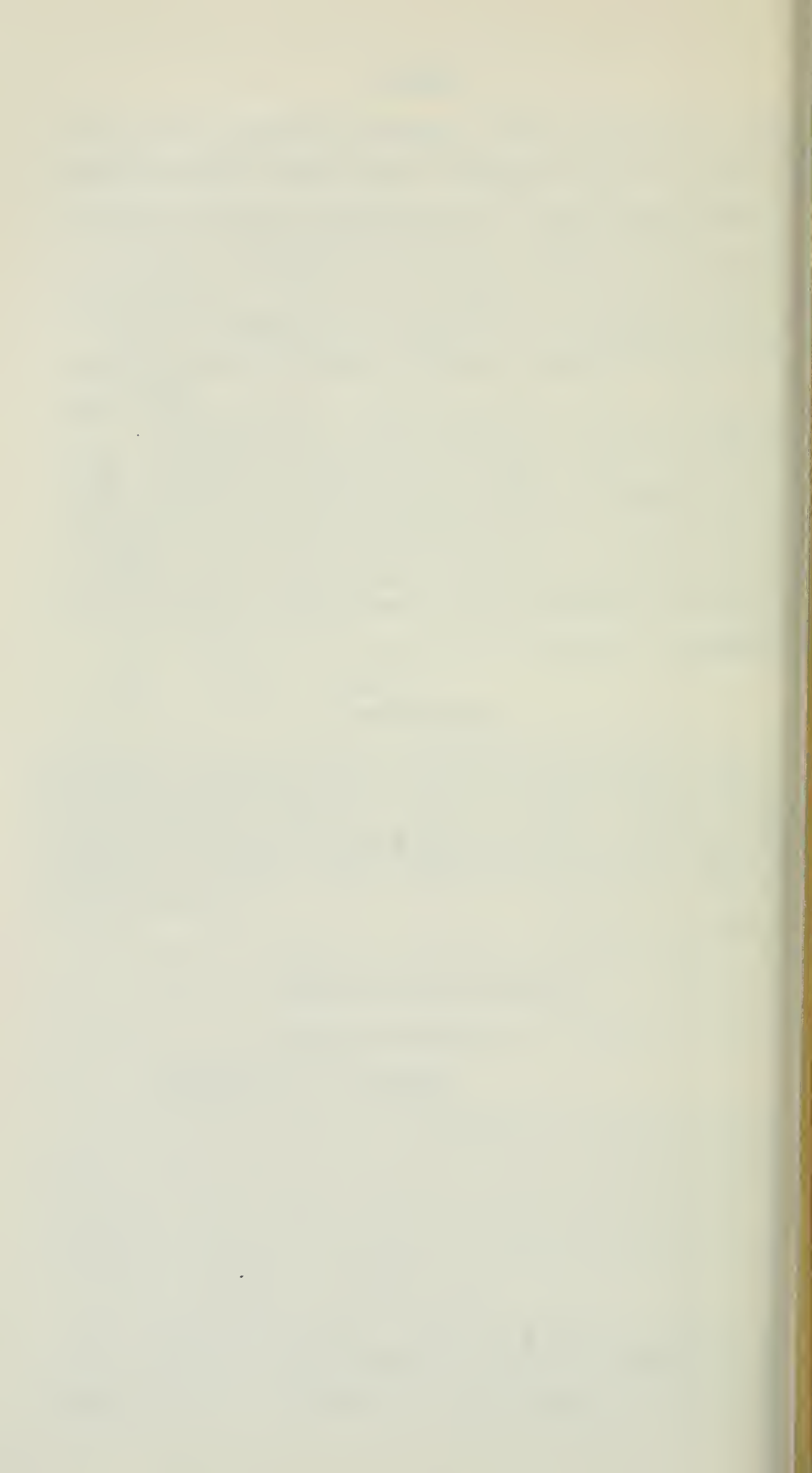
### Conclusion.

It is respectfully submitted that the burden of proof was upon Appellee; that he failed to sustain such proof; and that the record discloses no substantial evidence upon which Finding IX could be justified; and that the judgment should be reversed.

Respectfully submitted,

ROANE THORPE,

*Attorney for Appellant.*



No. 12147  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

FRANCIS F. QUITTNER, as Trustee in Bankruptcy of the  
Estate of Alvera Gordon Jones, doing business as LE-  
ROY GORDON BEAUTY SALONS,

*Appellee,*

*vs.*

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a  
National Banking Association,

*Appellant.*

---

**APPELLEE'S REPLY BRIEF.**

---

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**FILED**

MAR 30 1949



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*Appellant.*

---

## APPELLEE'S REPLY BRIEF.

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Appellee deems it necessary to call to the Court's attention additional facts adduced by the evidence, although it will be necessary for this Court to read the entire transcript as Appellee does not desire to repeat all the evidence.

Relating to the testimony of Robert R. Duval:

When Mrs. Jones presented Defendant with a statement, Plaintiff's Exhibit 2, in September, 1947, and Appellant looked at same giving it back to Mrs. Jones, Appellant did not ask her for a copy of said statement [R. 49]; nor does he remember comparing that statement with the statement dated March, 1947, which was in Appellant's file [R. 94]; that Appellant did not notice that

the tax claims as shown in the statement of August 31, 1947, were as large if not larger than they had been six months previously nor could he remember noticing that the accounts payable were substantially larger in the statement of August 31, 1947 [R. 94]; neither did Appellant ever go to look at the stores or the equipment in any of the stores; nor did Appellant know the condition of the equipment [R. 50].

The Appellee would also like to call to the Court's attention the fact that after the note was renewed on April 30, 1947, and on July 30, 1947, the note then became due on September 30, 1947; that it was not renewed by the Defendant on that date, but was in default from September 30, 1947, until December 6, 1947 [R. 40-21], when it was renewed on a *demand* basis with a ninety day limit.

The evidence further showed that the bankrupt's summary of debts and assets as set forth in her schedules filed in bankruptcy, showed debts in the sum of \$38,442.36 and assets in the sum of \$9,474.47 [R. 78]. The report of the appraiser of said bankrupt estate filed on March 27, 1948, indicated an appraisal of the real and personal property of the bankrupt set out in the schedules in the sum of \$9,930.00 [R. 26]. The order confirming sale of the bankrupt estate's beauty parlors, merchandise and fixtures set forth that the same was sold for \$5,100.00 [R. 27]. The testimony of Mrs. Jones was that her assets in November and December, 1947 and January, 1948, were substantially the same as they were in March, 1948 [R. 81].

## ARGUMENT.

### POINT I.

**Appellee Sustained the Burden of Proof Which Was Upon Him to Prove Every Element of a Preference Under the Bankruptcy Act.**

Appellee agrees that in order for the trustee to avoid a preference, the creditor must have had reasonable cause to believe that the debtor was insolvent at the time of the transfer.

Appellee further agrees that the burden of proving the existence of all essential elements is upon the trustee seeking to avoid the transfer.

With respect to Appellant's contention that Appellee did not sustain his burden of proof requiring him to establish that Appellant had reasonable grounds to believe that the bankrupt was insolvent at the time of the transfer, Appellee respectfully submits that Appellant did sustain such burden.

The evidence of Mr. Duval, manager of the Branch Bank of Appellant, showed that the last financial statement obtained by the Appellant was on March 31, 1947, that Appellant did not receive any financial statements after said March 31, 1947 [R. 38-39]; that subsequently some time during the summer of 1947, Appellant saw a statement which bankrupt presented to Appellant and which was taken back by the bankrupt, and that said statement showed a net worth, but that Appellant could not recall the amount thereof [R. 39]. The Appellant never saw any further statement or figures relative to the bankrupt's business after the statement of August 31, 1947 [R. 89]. The evidence of Mr. Duval also showed that he

did not ask for a copy of the statement of August 31, 1947 [R. 49]; that he had never seen the stores or their equipment, nor did he know the condition of the equipment [R. 50], neither could he remember comparing the statement of August 31, 1947, with the statement of March 31, 1947, which he had in his file [R. 94]. There was no evidence to show that he requested any further statement from the bankrupt from September 1947, until January 1948, when the note was finally paid, that Appellant did not notice that the tax claims as shown in the statement of August 31, 1947, were as large if not larger than they had been six months previously; nor could he remember noticing that the accounts payable were substantially larger in the statement of August 31, 1947 [R. 94], nor was there any evidence to show that Appellant had examined or analyzed the statement at all beyond seeing that it showed a net worth. Did the Defendant exercise the care of a reasonably prudent businessman in view of the knowledge which he had that the debtor had not been able to pay her note and that he had renewed said note three times? Was this the action of a banker, or a businessman trained in the intricacies of credit? The only logical explanation for his conduct under the circumstances is that he was aware that her assets were over-inflated and that he knew that the request for a statement was merely a perfunctory gesture; otherwise, it appears from the facts adduced by Defendant's testimony that he was grossly negligent in ascertaining the true state of his debtor's affairs.

With reference to the overdrafts allowed by the Defendant, the evidence showed that there were overdrafts of \$2,319.33 on October 1, 1947; \$4,059.82 on October 2, 1947 and \$5,100.42 on October 3, 1947, and that the

overdrafts continued in substantial amounts until October 11, 1947, when a credit balance of \$106.22 was shown, that on October 14, 1947, there was another overdraft of \$393.33 and that there were no overdrafts during the balance of October and during the month of November, 1947 [R. 47] and only two overdrafts in December, 1947, one of \$541.72 on December 8, 1947, and one \$13.00 on December 11, 1947 [R. 93]. The heavy overdrafts during October 1947, must have indicated to the Defendant the worsening condition of the debtor's financial status, and although Appellant contends that overdrafts were allowed in the early part of 1947 as well as in the latter part of the year, the record does not disclose the amounts of such early overdrafts. Why did the heavy overdrafts stop after October 11, 1947? Was the debtor told that they would not be honored? The Appellant's answer is that the debtor had been told that her overdrafts would not be honored. What other explanation would logically explain the sudden cessation of the large overdrafts after October 11, 1947? If the operation of the bankrupt's shops in regard to their banking procedure was such that overdrafts were customary, as contended by the Appellant, why weren't there any overdrafts in November and only two overdrafts in December? Why wasn't the note renewed until December 6, 1947?

Appellant asks the Court "Could it be reasonably said that if Appellant felt that the bankrupt would be unable to pay its note and would be unable to make good the overdrafts, Appellant would have permitted these things



to go on?" The evidence showed that the overdrafts did not go on, that the note was not renewed on September 30, 1947, and was in default until December 6, 1947, and that the bank balance was approximately \$100.00. The evidence further disclosed that the bankrupt was not able to pay the note, otherwise, she would not have taken one year to pay a ninety day note [R. 35-36-37].

Appellant contends that "The Appellee was not able to establish any evidence on the part of Appellant that the bankrupt was in any financial difficulty other than that she was short of working capital, and that a few of her beauty salons were not making money and she was advised to sell them." However, the testimony of the bankrupt, Mrs. Jones, disclosed that she had told Appellant that she was having financial difficulties and that Appellant knew that she was losing money right along [R. 70], that she felt that there was only one thing left to do and that was to go into receivership [R. 75-76], and that her understanding with the Appellant was that when she did sell the stores that she would take care of the loan and would do so as quickly as she could [R. 73].

Appellee respectfully submits that bankrupt was having financial difficulties; that she was short of working capital; that it was necessary to sell some of her beauty shops; that she had consistently large overdrafts during the month of October, 1947; that her note was renewed three times by the Appellant; that her note was in default from September, 1947 until December 6, 1947; that when Appellant was shown a statement which indicated a net



worth, he did not compare the statement with a copy of a prior statement which he had in his files, he did not analyze the statement, he failed to note or question the qualifications set forth by the accountants thereon or did he question the value of the assets, he did not ask for a copy of same for his records, nor did Appellant ask for any further statements after September, 1947, regarding the debtor's financial condition. It is Appellee's contention that the aforementioned facts should have given notice to the Appellant that the debtor was in serious financial difficulty and that if the Appellant disregarded these obvious warnings of the debtor's insolvent condition, it was negligent in not making such further inquiry into her affairs as would have disclosed the full extent of the true state of her affairs.

In the case of *Levy v. Weinberg and Holman Inc.* (C. C. A., 2nd Cir.), 20 Fed. Rep. 2d 565, the Court stated that a creditor may not wilfully close his eyes that he might remain in ignorance of his debtor's condition.

In the case of *Pender v. Chatham Phenix National Bank and Trust Co.* (C. C. A., 2nd Cir.), 58 Fed. Rep. 2d 968, the Court stated that in preference cases, notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose.

In the case of *Canright v. General Finance Corp.* (East Dist. of Ill.), 35 Fed. Supp. 841, the Court states:

"Defendant was charged with what it learned or should have learned as a reasonably prudent business-

man, through its representatives . . . Failure to investigate will afford no excuse when the creditor's knowledge and information are sufficient to have put an ordinary businessman on inquiry. It is not a question of actual belief; rather, the test is the belief that ought reasonably to be entertained under the facts known, the inference which an ordinarily intelligent businessman would draw from the facts which he would discover if he made inquiry. Defendant could not close his eyes to known or obvious facts, or facts which it could have ascertained, by making the inquiry of a reasonably prudent businessman. It was bound to make real inquiry, that is, such an investigation as a reasonably prudent and honest businessman would have made under the circumstances known."

In the case of *Boston National Bank v. Early*, 17 Fed. Rep. 2d 691, the Court stated:

"The president of the bank knew upon September 30, 1924 that the balances of the bankrupt were far below those required. The original loan had been carried for more than two years, the notes given for it being renewed from time to time, and upon this date, the bank was unwilling to renew the note of \$3,500.00, which then fell due, without assurances that larger balances would be maintained by the bankrupt. The statement of the bankrupt's account showed decreasing deposits after that date. Checks were held as overdrafts in order to secure payment of the note. These facts should have put creditors upon inquiry, which would have showed that the company was bankrupt."

## POINT II.

**The Evidence Sustained the Finding [Finding IX, R. 9] That Appellant Was in Possession of Sufficient Facts Concerning the Bankrupt's Business as Would Give It Reasonable Cause to Believe That the Bankrupt Was Insolvent.**

The Appellee respectfully submits that there was substantial evidence to sustain Finding IX [R. 9] that Appellant was in possession of sufficient facts concerning the bankrupt's business as would give it reasonable cause to believe that the bankrupt was insolvent. Appellee further submits that the trial court is the sole trier of the facts and found from all of the facts from the evidence presented that Appellant had reasonable cause to believe that the bankrupt was insolvent.

Appellant has cited cases that a mere suspicion is not sufficient to show that the creditor had reasonable cause to believe. In the case at bar, Appellee respectfully contends that the evidence disclosed a set of circumstances which would give an ordinarily prudent businessman more than a mere suspicion that the debtor was insolvent; such facts should certainly give a prudent businessman a reasonable cause to believe, and if he failed to realize that such facts showed the insolvency of the debtor or that the situation called for further inquiry into his debtor's affairs, he must be accused of wilfully closing his eyes.

In the case of *In re Eggert* (C. C. A., 7th Cir.), 102 Fed. Rep. 735, the Court stated that if facts and circumstances with respect to the debtor's financial condition are brought home to the creditor such as would put an ordinarily prudent businessman upon inquiry, the creditor is

chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.

In the case of *Prudential Ins. Co. of America v. Nelson* (C. C. A., 6th Cir.), 36 Amer. Bankruptcy Rep. (N. S.) 993, 96 Fed. Rep. 2d 487, the Court states:

“While it is true that mere suspicion of insolvency or preferential effect is not enough to establish the voidability of a transfer, yet neither are circumstances which carry absolute conviction of insolvency the test of its infirmity . . . if reasonable cause to believe a transferor insolvent and his transfer preferential in effect must wait upon complete audit and appraisal of a bankrupt’s affairs, preferential transfers would rarely exist and the statutory protection to creditors be unavailing.”

It is respectfully urged that Appellant was aware of such various facts: the inability of the debtor to pay the ninety day note until one year had elapsed, the heavy overdrafts of the bankrupt, the financial difficulties of the bankrupt, the necessity of the bankrupt to sell a store in order to pay the note, the bankrupt’s operating losses, and the bankrupt’s discussion as to receivership. In view of these obvious danger signals, why didn’t the Appellant ask for additional financial statements after the one it saw in September, 1947, or why didn’t it investigate further into the status of the debtor? Is this the logical action of a bank, an institution which is noted for its careful handling of credit matters, the staunch rock of the business community? It is obvious that Appellant either already knew that insolvency existed or else was grossly careless in not pursuing further inquiry. The Appellee respectfully contends that if the Appellant saw fit to close its eyes to the obvious, to sit back and not make further

inquiry into a situation which, at the least, called for additional investigation, then the Appellant was negligent, and it cannot assert such negligence in support of its contention that it did not have reasonable cause to believe the debtor was insolvent.

### POINT III.

**The Evidence Sustained the Finding That at the Time of the Payment to Defendant Made by Bankrupt the Fair Valuation of the Aggregate of Her Property Was Not Sufficient in Amounts to Pay Her Debt.**

Since the Appellant has not seen fit to introduce argument on Point III of Appellant's Statement of Points upon which it intends to rely on appeal, the Appellee will forego argument on this point, except to refer to the evidence which showed that the bankrupt's Summary of Debts and Assets, as set forth in her schedules filed in bankruptcy on March 26, 1948, disclosed debts amounting to \$38,442.36 and assets amounting to \$9,474.47 [R. 78]; that the report of the appraiser filed on March 27, 1948, indicated that his appraisal of the real and personal property belonging to the estate of the bankrupt was in the sum of \$9,930.00 [R. 81]; and that the Order Confirming Sale of the bankrupt's beauty shops together with the inventory of merchandise and fixtures showed that said property was sold for the sum of \$5,100.00 [R. 80]; that the testimony of Mrs. Jones was that her assets in November and December 1947, and January 1948, were substantially the same as they were in March, 1948 [R. 81]; all of which indicates beyond question of doubt that the bankrupt was insolvent.

### Conclusion.

The Appellee respectfully submits that he sustained the burden of the proof; that there is substantial evidence to sustain the finding of the Court, Finding IX, that prior to and at the time of the payments or transfers, said Appellant was in possession of such facts concerning the bankrupt's business as would give it reasonable cause to believe that the said bankrupt was insolvent; and that the judgment of the District Court should be affirmed.

Respectfully submitted,

IRWIN R. BUCHALTER and  
RICHARD L. MOSS,

*Attorneys for Appellee.*



No. 12147

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National Banking Association,

*Appellant.*

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APPELLANT'S REPLY BRIEF.

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**FILED**

APR 5 1949

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**CLERK**



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## APPELLANT'S REPLY BRIEF.

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Appellee relies strongly under his POINT I on the fact that the bankrupt was allowed overdrafts frequently, and cites the case of *Boston National Bank v. Early*, 17 Fed. Rep. 2d 691, in support of his contention that the Appellant was put upon inquiry because of such overdrafts. The Appellant believes it has demonstrated to the Court that there was nothing unusual about these overdrafts, and that, by reason of the method of operation of the various beauty shops of the bankrupt, it was a frequent and established procedure. Surely a bank would not continue to permit overdrafts under these circumstances if it felt its depositor to be insolvent.

Under POINT II of Appellee's brief it is contended that facts and circumstances were brought home to Appellant that should have put it on notice. It is respectfully submitted that the financial statement shown Appellant dated on or about August 31, 1947, wherein a net worth of \$19,450.35 is shown, was the last information Appellant had relative to the books of the bankrupt, and that it had a right to rely thereon.

*Dougherty v. First National Bank of Canton*, 197 Fed. Rep. 241.

Under POINT III of Appellee's brief he has gone into the proposition as to whether or not the evidence sustains the Finding that at the time of the payments to Appellant the fair valuation of the aggregate of the bankrupt's property was sufficient to pay her debts.

In answer to the Appellee's contention, Appellant takes the position that no valuation of the assets was proven by Appellee based on the business of the bankrupt as a going concern, but only as dead property after the bankruptcy had intervened. In the case of *Dougherty v. First National Bank of Canton*, cited above, the Court said in part:

“\* \* \* but the valuation for the test of solvency or insolvency under the issue made must relate to the conditions affecting the hotel as a going concern when the mortgage was given, and not at its value as dead property after bankruptcy intervened \* \* \*”

Again, in the case of *J. W. Butler Paper Co. v. Goembel*, 143 Fed. Rep. 295, the Court said in part:

“\* \* \* The valuation for the test of solvency or insolvency under the issue must relate to the conditions, as going concern, when the alleged prefer-



ence was given, and not to the mere dead matter of the plant after bankruptcy intervened; \* \* \*

Nowhere in the record does any valuation of the aggregate of the bankrupt's property as a going concern appear except in the statement of August 31, 1947, which shows the bankrupt to have been then solvent.

### Conclusion.

It is respectfully submitted to the Court that Appellee has not sustained his burden of proof.

Respectfully submitted,

ROANE THORPE,

*Attorney for Appellant.*















